Supreme Court, U.S.
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No. —

IN THE
Supreme Court of the United States

FISHING VESSEL CHLOE Z,
Petitioner,

v.

ROBERT MATOS AND SLOBODAN PRANJIC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL A. BARCOTT
HOLMES WEDDLE & BARCOTT
999 Third Avenue
Suite 2600
Seattle, Washington 98104
(206) 292-8008

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7951

Counsel for Petitioner

December 29, 2006

QUESTION PRESENTED

Whether the three-year statute of limitations for maritime tort actions bars a suit filed more than three years after the claim arose, when the plaintiff filed a prior, timely suit asserting the same claim but failed to pursue the claim in that prior suit.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Fishing Vessel CHLOE Z was the defendant in the district court proceedings and the appellee in the court of appeals proceedings.

Respondents Robert Matos and Slobodan Pranjic were plaintiffs-intervenors in the district court proceedings and appellants in the court of appeals proceedings.

TCW Special Credits was a plaintiff in the district court proceedings, but did not participate in the court of appeals proceedings and thus is not a respondent in this Court.

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Fishing Vessel CHLOE Z respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This petition involves whether a judicially created exception should be engrafted onto the three-year federal statute of limitations for maritime personal-injury actions. In 1991 and 1992, Slobodan Pranjic and Robert Matos, who are respondents here, were injured while working aboard the Fishing Vessel CHLOE Z, which is the petitioner in this case. In 1996, respondents sought to intervene in this case, which is a mortgage-foreclosure action against the CHLOE Z brought by a lender completely unrelated to respondents. The CHLOE Z opposed respondents' intervention, on the ground that, because more than three years had passed since respondents' injuries, their claims were barred by the three-year statute of limitations for maritime tort actions. The district court agreed. But the Ninth Circuit reversed, over a strong dissent. It held that respondents' claims were not untimely, although more than three years had passed since their injuries, relying on the fact that respondents had filed timely claims against the CHLOE Z in 1994 – claims that respondents had failed to pursue.

The Ninth Circuit's holding that the filing of a timely maritime tort claim against a defendant in one case tolls the running of the statute of limitations for the purposes of a separate, untimely suit against that defendant conflicts with decisions of the First, Third, Fifth, and Eighth Circuits. Those courts, interpreting the general statute of limitations for maritime torts and the functionally identical statute of limitations that applies to maritime personal-injury claims under the Jones Act, all have held that an untimely suit is not made timely by the plaintiff's filing of a prior, timely suit. The Ninth Circuit's departure from the rule prevailing in the Fifth Circuit is of particular concern because it creates a conflict between the

two courts of appeals that handle most of the country's maritime personal-injury litigation.

Furthermore, the Ninth Circuit's interpretation of the maritime statute of limitations is erroneous. Under the plain language of that provision, respondents' claims in this case are clearly untimely because they were brought more than three years after respondents' injuries. Although this Court has permitted statutes of limitations to be tolled in certain circumstances, respondents cannot claim the benefits of that doctrine. Respondents were not diligent because they failed to pursue their original claims against the CHLOE Z. In addition, because respondents failed to cause the arrest of the CHLOE Z in the original suits, they neither put interested third parties on notice of their claims against the CHLOE Z nor took the necessary first step in pursuing their claims against the CHLOE Z. Under those circumstances, the statute of limitations must be enforced as written. As this Court has explained in summarily reversing a court of appeals' failure to enforce a statute of limitations, "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam).

Finally, the disuniformity fostered by the decision below undermines Congress's purpose in enacting the statute of limitations at issue here – namely, "to establish a *uniform* national statute of limitations for maritime torts." H.R. Rep. No. 96-737, at 1 (1980) (emphasis added). In addition, the issue presented is of everyday importance in the administration of maritime personal-injury suits. Few issues are more fundamental to litigation than when a statute of limitations applies. The Ninth Circuit's decision also encourages plaintiffs to shop for a favorable forum in which to file untimely claims.

OPINIONS BELOW

The memorandum order of the court of appeals (Pet. App. 1a-6a) is not reported (but is available at 185 F. App'x 569). The district court's findings of fact and conclusions of law (*id.* at 7a-15a) and its judgment (*id.* at 16a) are not reported.

JURISDICTION

The court of appeals entered its judgment on June 5, 2006. A petition for rehearing was denied on August 3, 2006. *See* Pet. App. 60a-61a. On October 26, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to ~~and~~ including December 1, 2006, and on November 27, 2006, further extended the time within which to file a petition to and including December 29, 2006. *See id.* at 68a, 69a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth at Pet. App. 62a-67a.

STATEMENT OF THE CASE

A. Legal Background

1. The general maritime law doctrine of unseaworthiness, under which respondents brought claims in this case, imposes on ship owners a duty "to furnish a vessel and appurtenances reasonably fit for their intended use." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960); *see also Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001). A seaman ~~injured~~ by an unseaworthy condition may bring an action *in personam* against the owner of the vessel. *See, e.g., Lewis*, 531 U.S. at 441. In addition, a seaman's unseaworthiness claim, like most maritime torts, gives rise to a maritime lien, which may be enforced in an action *in rem* against the vessel. *See* Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 35-37, 622-24, 628-29 (2d ed. 1975) ("Gilmore & Black").

As this Court has explained, in an admiralty "'proceeding[] *in rem*,'" the vessel "'is itself treated as the offender and made the defendant by name or description in order to enforce a lien.'" *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998) (quoting *Madruga v. Superior Court*, 346 U.S. 556, 560 (1954)). In an action *in rem*, the vessel in which the plaintiff claims a lien is arrested at the outset of the litigation. *See* Gilmore & Black 36-37; Fed. R. Civ. P. Supp. R. C(3)(a)(ii)(A) (When an *in rem* action is filed, "the court must review the complaint and any supporting papers. If the conditions for an in rem action appear to exist, the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action."); *see also Rounds v. Cloverport Foundry & Mach. Co.*, 237 U.S. 303, 306 (1915) (a "proceeding *in rem* . . . is one essentially against the vessel itself as the debtor or offending thing, . . . in which the vessel is itself *seized* and impleaded as the defendant") (internal quotation marks omitted; emphasis added); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1867) (same).

2. This case involves the proper interpretation of the three-year statute of limitations for maritime personal-injury tort claims. *See* Act of Oct. 6, 1980, Pub. L. No. 96-382, § 1, 94 Stat. 1525, 1525; 46 U.S.C. app. § 763a (2000). Congress enacted that statute "to establish a uniform national statute of limitations for maritime torts." H.R. Rep. No. 96-737, at 1 (1980). In particular, Congress sought to remedy disuniformity in the time for filing unseaworthiness claims, which had been governed by the equitable doctrine of laches. *See id.* at 1-2. In addition, Congress intended to conform the general statute of limitations for maritime tort claims to the three-year statute of limitations for claims under the Jones Act, *see id.*, which provides seamen a cause of action for injuries caused by employers' negligence, *see Lewis*, 531 U.S. at 441. To those ends, Public Law No. 96-382 provided that, in pertinent part, "[u]nless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both,

arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued." § 1, 94 Stat. 1525. The statute was reproduced in the Appendix to Title 46 of the U.S. Code, 46 U.S.C. app. § 763a (2000).

In October 2006, Congress enacted a statute to "reorganiz[e] and restat[e] the laws currently in the appendix to title 46." Act of Oct. 6, 2006, Pub. L. No. 109-304, § 2(a), 120 Stat. 1485, 1485 ("2006 Act"). That legislation restated the statute of limitations for maritime torts in § 763a as follows: "Except as otherwise provided by law, a civil action for damages for personal injury or death arising out of a maritime tort must be brought within 3 years after the cause of action arose." *Id.* § 6(c), 120 Stat. 1511 (to be codified as positive law at 46 U.S.C. § 30106).

Although the wording of new § 30106 differs from former § 763a in minor respects, the Act makes clear that Congress intended no change in meaning. *See id.* § 2(b), 120 Stat. 1485 ("[i]n the codification of laws by this Act, the intent is to conform to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections"); *see also* 2 U.S.C. § 285b(1) (explaining that the function of the Office of the Law Revision Counsel, which participated in drafting Public Law No. 109-304, is to restate laws in a way that conforms to the intent of the original drafters). Further, the Act's legislative history shows that no substantive changes were intended. *See* H.R. Rep. No. 109-170, at 40 (2005) (explaining that the changes in wording were for clarity and consistency); *see also id.* at 2 (the bill "codifies existing law rather than creating new law"); *id.* at 23-24 ("changes are not intended . . . to lead to changes in result, and therefore they should not impair the precedent[ial] value of earlier judicial decisions or other interpretations"; "anyone interpreting the law should assume that no change in result was intended by this bill"). Thus, the statute of limitations for maritime tort claims in effect

today is substantively identical to the statute in force when respondents were injured.

3. Public Law No. 109-304 also restated the Jones Act, which was originally enacted as § 33 of the Merchant Marine Act of 1920, ch. 250, 41 Stat. 988, 1007. *See* Gilmore & Black 325-27. The Jones Act had been located at 46 U.S.C. app. § 688 (2000), and it now will be codified as positive law at 46 U.S.C. §§ 30104-30105. *See* 2006 Act, § 6(c), 120 Stat. 1510. The Jones Act incorporates the provisions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, including the three-year statute of limitations in 45 U.S.C. § 56. *See* 2006 Act, § 6(c), 120 Stat. 1510 ("Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.") (to be codified as positive law at 46 U.S.C. § 30104(a)); 46 U.S.C. app. § 688(a) (2000) ("in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply"); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225 & n.6 (1958) (three-year limitations period in 45 U.S.C. § 56 applies to Jones Act claims); *see also* Gilmore & Black 351-53. There is no material difference between the language of § 56, which provides in pertinent part that "[n]o action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued," and either the present or the former version of the statute of limitations for maritime torts. *See supra* pp. 4-5.

B. Factual and Procedural Background

1. In 1991 and 1992, respondents were injured while working aboard petitioner Fishing Vessel CHLOE Z ("the CHLOE Z"). *See* Pet. App. 8a. At the time of their injuries, they were employed by Chloe Z Fishing Co., Inc. ("Fishing Company"), which owned the CHLOE Z.

In 1994, respondents each filed suits asserting unseaworthiness claims *in personam* against Fishing Company. *See id.* Each respondent also pleaded claims *in rem*

against the CHLOE Z. *See id.* But neither respondent ever caused the arrest of the CHLOE Z or otherwise pursued the claims against the vessel. *See id.* at 8a & n.4, 12a-13a. In addition, each respondent agreed to the dismissal of his claims against the CHLOE Z. *See id.* 17a, 25a (pretrial orders stipulating that all parties named in the pleadings other than Fishing Company and two other corporations "are now dismissed"); *see also* Fed. R. Civ. P. 41(a)(1)(ii) ("an action may be dismissed by the plaintiff without order of court . . . by filing a stipulation of dismissal signed by all parties who have appeared in the action").[1]

Respondents' claims against Fishing Company were tried to juries, and respondents prevailed in both cases. *See id.* at 9a, 12a-13a, 14a-15a. The district court entered judgments *in personam* against Fishing Company only. *See id.* at 33a-36a. The Ninth Circuit affirmed those judgments. *See Pranjic v. Chloe Z Fishing Co.*, No. 96-17279, 1997 WL 697384 (9th Cir. Nov. 6, 1997) (judgment noted at 129 F.3d 127 (table)); *Matos v. Chloe Z Fishing Co.*, No. 96-17278, 1997 WL 702919 (9th Cir. Nov. 7, 1997) (judgment noted at 129 F.3d 126 (table)). Fishing Company was insolvent and unable to pay the judgments against it. *See* Pet. App. 9a.[2]

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[1] Fishing Company initially failed to answer, and defaults were entered against it in both cases. *See* Docket Entry 13, *Pranjic v. Chloe Z Fishing Co.*, No. 94-00014 (D. Guam July 26, 1994); Docket Entry 12, *Matos v. Chloe Z Fishing Co.*, No. 94-00013 (D. Guam July 26, 1994). Subsequently, Fishing Company appeared, and the district court set aside the defaults. *See* Docket Entry 40, *Pranjic v. Chloe Z Fishing Co.*, No. 94-00014 (D. Guam Dec. 13, 1994); Docket Entry 41, *Matos v. Chloe Z Fishing Co.*, No. 94-00013 (D. Guam Dec. 13, 1994). Because the CHLOE Z was never arrested, however, it never appeared or had a default entered against it in either case.

[2] The district court found that, while respondents' suits against Fishing Company were pending, respondents "should have been or were in fact *well aware* of [Fishing Company]'s financial difficulties" and still "chose to only pursue their *in personam* cases" against Fishing Company. Pet. App. 12a-13a (emphasis added).

2. In August 1996, TCW Special Credits brought this action *in rem* to enforce its preferred ship mortgage on the CHLOE Z. *See* Pet. App. 38a.[3] In December of that year, respondents moved to intervene in this case as plaintiffs, so that they could assert unseaworthiness claims *in rem* against the CHLOE Z – the same type of claim that they had pleaded but failed to pursue in their prior suits. *See id.* at 9a.[4] Because more than three years had elapsed since respondents' injuries in 1991 and 1992, the CHLOE Z asserted that the three-year statute of limitations for maritime tort claims in 46 U.S.C. app. § 763a (2000) barred respondents' attempts to intervene and to assert claims against it in this case. *Id.*

a. The district court initially rejected the CHLOE Z's statute-of-limitations defense on the ground that the CHLOE Z was equitably estopped from asserting the statute of limitations. Respondents subsequently prevailed at trial on their unseaworthiness claims against the CHLOE Z. *See* Pet. App. 7a n.1.

On appeal, the Ninth Circuit reversed the district court's judgment in favor of respondents, holding that the district court had erred in failing to conduct a hearing on disputed issues of fact involving the equitable-estoppel issue. *See id.* at 54a, 58a. The court of appeals remanded

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[3] Like a maritime tort claim, a preferred ship mortgage gives rise to a maritime lien that can be enforced in an action *in rem* against the vessel. *See* Gilmore & Black 630.

[4] Before filing their motions to intervene in this mortgage-foreclosure case, but months after the final judgments were entered in their suits against Fishing Company, respondents moved the district court to consolidate their completed cases against Fishing Company with this case. The court denied those motions because, among other reasons, there was insufficient commonality between those actions *in personam* and this action *in rem*. *See* Pet. App. 40a ("The fact that the Matos case [against Fishing Company] was brought in personam and the Chloe Z foreclosure case [*i.e.*, this case] is in rem cannot be disregarded. This jurisdictional distinction makes the argument that there exists a commonality of any issues between these cases somewhat dubious."), 47a (same for Pranjic).

this case to the district court for an evidentiary hearing. *See id.*

b. On remand, the district court concluded that equitable estoppel did not preclude the CHLOE Z from asserting the statute of limitations as a defense to respondents' attempts to intervene in this case. *See* Pet. App. 9a-15a. The court also found that the three-year statute of limitations had expired when respondents sought to intervene in this proceeding. *See id.* at 13a, 14a, 15a.[5] Accordingly, the court held that respondents' "*in rem* causes of action are in fact time barred by the statute of limitations," *id.* at 15a, and it entered judgment in favor of the CHLOE Z, *see id.*

c. The Ninth Circuit reversed. *See* Pet. App. 1a-6a. The entire panel agreed with the district court's rejection of respondents' equitable-estoppel claim. *See id.* at 2a (majority), 3a (Reed, J., dissenting). The court determined that the district court had "correctly found no misrepresentations and no equitable estoppel." *Id.* at 2a.

The court then addressed whether the statute of limitations had expired before respondents moved to intervene in this case. It observed that "[t]he defendant vessel argues, with some plausibility, that implicit in our remand on the equitable estoppel was a holding that, absent such estoppel, the statute of limitations was a bar." *Id.* Even though the parties had not briefed to the Ninth Circuit the statute-of-limitations issue, the panel majority reasoned that, "[n]ow that the equitable estoppel issue has disappeared, we address, for the first time, whether the *in rem* proceeding was barred by the statute of limitations." *Id.* The court held that the statute of limitations did not run before respondents intervened in this case, relying on the fact that respondents had filed suits in 1994, "well

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[5] The district court's fourth conclusion of law contains a typographical error; it states that respondents were injured in 1991 and 1996. *See* Pet. App. 13a. As the district court found in its first finding of fact, *see id.* at 8a, it is undisputed that respondents were injured in 1991 and 1992.

within the three-year period" of the statute of limitations. *Id.*[6]

Judge Reed dissented. He stated that the Ninth Circuit's prior "remand on the issue of equitable estoppel implicitly held that, absent such estoppel, the statue [*sic*] of limitations was a bar." *Id.* at 3a. On the merits, he could "see no basis for tolling [respondents'] claims against the Chloe Z." *Id.* at 4a. In explaining his view that tolling was inappropriate, Judge Reed noted that "the court here accepts the district court's finding that [respondents'] failure to pursue their 1994 *in rem* complaint against the Chloe Z was the product of poor judgment, not a defective pleading or any misconduct by the Chloe Z. This is tantamount to a finding that the decision not to try the 1994 *in rem* claims was 'garden variety excusable neglect,' which precludes equitable tolling." *Id.* (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)). Judge Reed also explained at length that the majority had erroneously failed to give effect to respondents' voluntary dismissals of their original *in rem* claims against the CHLOE Z and appeared to have misunderstood pertinent record facts. *See id.* at 4a-6a.

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[6] The court also stated that respondents' voluntary dismissals of their claims *in rem* against the CHLOE Z in the 1994 suits were ineffective because the district judge did not sign the pretrial orders, as required by a Guam local court rule. *See* Pet. App. 2a-3a.

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT CREATED A CONFLICT WITH FOUR OTHER CIRCUITS ON AN IMPORTANT QUESTION OF MARITIME LAW

A. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals

The Ninth Circuit decided in this case that the filing of a timely maritime tort claim against a defendant in one case tolls the running of the statute of limitations for the purposes of a separate, untimely action against that defendant. That conclusion conflicts with the decisions of the First, Third, Fifth, and Eighth Circuits interpreting the general statute of limitations for maritime torts and the functionally identical statute of limitations that applies to Jones Act claims. Those courts all have held that an untimely suit is not made timely by the plaintiff's filing of a prior, timely suit.[7]

1. Fifth Circuit

In *Basco v. American General Insurance Co.*, 43 F.3d 964 (5th Cir. 1994), the plaintiff was injured by a piece of equipment while working on an offshore oil platform. *Id.* at 964-65. He brought a timely suit against the platform operator. *Id.* at 965. Before the expiration of the statute of limitations, he joined the equipment maker as a defendant in that action, but later voluntarily dismissed the

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[7] The dissent below was correct that (1) implicit in the 2000 remand was the holding that the statute of limitations barred respondents' claims in this case unless the district court found that the CHLOE Z was equitably estopped from asserting that defense, and (2) the majority further erred in not giving effect to the voluntary dismissals. Nonetheless, those issues do not affect the question presented. This petition assumes that the panel properly reached and decided the question whether the statute of limitations had run. In addition, if the CHLOE Z is correct that respondents' filing of timely claims against it does not, without more, justify tolling the statute of limitations for purposes of their present untimely claims, then reversal is required regardless of whether the 1994 *in rem* claims were voluntarily dismissed. It is enough that those claims were neither pursued nor perfected through arrest of the vessel.

equipment maker. *Id.* Meanwhile, he filed a completely separate (and also timely) action against yet a third defendant, his employer. *Id.* He subsequently attempted to join the equipment maker as a defendant in the suit against his employer. *Id.* At that time, he had not yet dismissed the equipment maker from the suit against the platform operator. *Id.* But, critically, the statute of limitations had expired. *Id.*

The equipment maker asserted that the three-year statute of limitations in 46 U.S.C. app. § 763a (2000) barred the plaintiff's attempt to join it in the suit against the employer. *Id.* The plaintiff responded that the statute of limitations had not run because his first claim against the equipment maker was still pending when he sought to join the equipment maker as a defendant in the suit against the employer. *Id.*

The Fifth Circuit held that the maritime statute of limitations barred the plaintiff's claim against the equipment maker. *Id.* at 965-66. The court rejected the plaintiff's contention that, "for purposes of satisfying the statute of limitations for federal maritime torts, the filing of the first suit tolled the statute of limitations as to the filing of the second suit." *Id.* at 966. That conclusion squarely conflicts with the Ninth Circuit's reliance on respondents' pleading of *in rem* claims in earlier 1994 suits as the basis for finding that their intervention in this case was timely.

2. First Circuit

In *McKinney v. Waterman Steamship Corp.*, 925 F.2d 1 (1st Cir. 1991), the plaintiff, McKinney, was injured while working on a vessel owned by his employer, Waterman. *Id.* at 2. Two years after McKinney was injured, Waterman filed for bankruptcy. *Id.* Within three years of his injury, but after Waterman had filed for bankruptcy, McKinney sued Waterman, asserting unseaworthiness and Jones Act claims. *Id.* McKinney voluntarily dismissed that action after learning of Waterman's bankruptcy, and the parties engaged in settlement discussions. *Id.* In 1989, two years after the bankruptcy stay was

lifted, McKinney filed another suit against Waterman, again asserting unseaworthiness and Jones Act claims. *Id.* "Not counting the time during which the bankruptcy stay prevented McKinney from suing, more than four years passed between McKinney's injury and the filing of the present complaint." *Id.* Accordingly, the district court dismissed the suit as time barred. *Id.*

McKinney argued on appeal that "he should receive an equitable extension of the statute of limitations" because, among other things, his initial suit and the parties' settlement activity apprised Waterman of his intent to pursue his claims. *Id.* at 3. The First Circuit rejected that contention and affirmed the district court's dismissal of McKinney's second suit. *Id.* at 6. The court observed that McKinney's position, if accepted, would have led to the absurd result that "a plaintiff who provided notice of his claim within the period could then wait an indefinite time to reinitiate the prosecution of his case." *Id.* (internal quotation marks omitted).

3. Third Circuit

In *Claussen v. Mene Grande Oil Co.*, 275 F.2d 108 (3d Cir. 1960), the Third Circuit held that a seaman's claim under the Jones Act was time barred because it was filed more than three years after the date of the injury. *See id.* at 110. The court squarely rejected the plaintiff's contention that "an earlier suit filed on these claims" – which was discontinued for failure of process, *see id.* at 112 – "somehow tolled the statute of limitations for the present entirely distinct action." *Id.* at 110. The Third Circuit deemed that argument – which the Ninth Circuit found persuasive in this case – to be "wholly without merit." *Id.*

4. Eighth Circuit

In *Mamer v. Apex R.E. & T.*, 59 F.3d 780 (8th Cir. 1995), the plaintiff filed a timely suit against his employer to recover for injuries suffered while working on his employer's vessel. *Id.* at 781. While that suit was pending, the employer filed for bankruptcy. *Id.* The plaintiff filed a claim in the bankruptcy proceeding, entered into

mediation with the employer, and voluntarily dismissed his suit against the employer (which he could not have pursued then in any event because of the bankruptcy stay). *Id.* A year and a half after the employer emerged from bankruptcy, the plaintiff again filed suit against it. *Id.* The district court granted the employer's motion for summary judgment on the ground that the plaintiff's unseaworthiness and Jones Act claims were barred by the three-year statute of limitations applicable to those claims. *Id.*

The plaintiff appealed, contending that the district court erred in failing to toll the statute of limitations. *Id.* The court of appeals rejected that contention, and in so doing it explained that the plaintiff's prior timely suit did not justify tolling the statute of limitations. *Id.* at 782.

* * *

In sum, the Ninth Circuit's decision in this case creates a clear conflict with four other circuits over whether an untimely suit is rendered timely by the plaintiff's filing of a prior, timely suit.[8]

B. The Ninth Circuit Erroneously Interpreted The Statute Of Limitations For Maritime Torts

The Ninth Circuit's decision to embark on a new course is especially problematic because its reasoning and result are flatly contrary to the legislative judgment Congress has made in enacting a three-year time period for plaintiffs to pursue maritime claims of the type at issue here.

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[8] The court of appeals' refusal to publish its decision in this case presents no obstacle to this Court's review. *See, e.g., Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 126-27 (1995) (reviewing unpublished court of appeals decision regarding applicability of general removal statute's bar against review of remand orders); *see also Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit[.]") (Blackmun, J., dissenting from denial of certiorari); *cf. Stutson v. United States*, 516 U.S. 193, 196 (1996) (per curiam) ("[a] contrary approach would risk effectively immunizing summary dispositions by courts of appeals from our review").

The court below should have affirmed the district court's judgment dismissing respondents' claims against the CHLOE Z as time barred.

1. By its plain terms, the statute of limitations for maritime torts bars respondents' claims in this case. At the time of the events at issue here, the statute provided that "a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued." 46 U.S.C. app. § 763a (2000). It is undisputed that respondents seek "recovery of damages for personal injury . . . arising out of a maritime tort," namely, unseaworthiness. And it is undisputed, as the district court found, that respondents' claims against the CHLOE Z accrued in 1991 and 1992 and that respondents did not attempt to intervene in this action until 1996. *See* Pet. App. 8a, 9a. Therefore, under the clear language of the statute of limitations, respondents' claims in this case were untimely because they were not commenced "within three years from the date the cause[s] of action accrued."

The conclusion is the same under the statute as restated by Public Law No. 109-304. Under that Act, "a civil action for damages for personal injury or death arising out of a maritime tort must be brought within 3 years after the cause of action arose." 2006 Act, § 6(c), 120 Stat. 1511 (to be codified as positive law at 46 U.S.C. § 30106). Thus, because respondents' claims against the CHLOE Z in this case were not "brought within 3 years after the cause[s] of action arose," they are time barred.

2. In accordance with that straightforward textual analysis, the district court concluded that respondents' "*in rem* causes of action are in fact time barred by the statute of limitations." Pet. App. 15a. But the Ninth Circuit reversed, implicitly concluding that the statute of limitations was tolled by respondents' filing of timely claims against the CHLOE Z in their 1994 suits. *See id.* at 2a-3a. The court of appeals offered no support for that

conclusion, and an examination of this Court's cases shows that it was unjustified.

Although this Court has indicated that equitable principles of tolling, estoppel, and waiver ordinarily can be applied to excuse untimeliness where Congress has not expressed a contrary intent, *see, e.g., Young v. United States*, 535 U.S. 43, 50 (2002), the Court has cautioned that those principles "are to be applied sparingly," *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). That is because "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam).[9]

A comparison of the decision below to this Court's decision in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965), shows that the Ninth Circuit erroneously disregarded the procedural requirements established by Congress in the maritime statute of limitations. In *Burnett*, the Court held that, when a plaintiff begins a timely suit under the Federal Employers' Liability Act in a state court that has jurisdiction and serves the defendant with process and the plaintiff's case is dismissed for improper venue, the statute of limitations in the Act is tolled during the pendency of the state suit. *Id.* at 434-35. The rationale for that decision was twofold: the plaintiff did not sleep on its rights, and the original suit put the defendant on notice that it would be expected to defend a suit arising from the incident at issue. *See id.* at 427-30.

Like the plaintiff in *Burnett*, respondents filed initial timely suits, followed by subsequent untimely suits. But, critically, the plaintiffs in *Burnett* acted diligently in

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[9] Thus, in *Baldwin County Welcome Center*, the Court summarily reversed an unpublished court of appeals decision that had held that the filing of a right-to-sue letter in a federal court tolled the statute of limitations under Title VII of the Civil Rights Act of 1964. *See* 466 U.S. at 149.

pursuing their claims. Here, however, the district court explicitly found that respondents knew during the pendency of the prior suits that Fishing Company was in financial trouble and that they nevertheless chose *not* to pursue their claims *in rem* against the CHLOE Z in those cases. *See* Pet. App. 12a-13a, 14a-15a. Thus, in contrast to the plaintiff in *Burnett*, respondents *did* sleep on their rights. That lack of diligence precludes any reliance by them on the doctrine of tolling. *See Baldwin County Welcome Ctr.*, 466 U.S. at 151 (refusing to apply tolling because "[o]ne who fails to act diligently cannot invoke equitable principles [such as tolling] to excuse that lack of diligence"); *see also Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) ("Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."). At best, respondents' failure to recognize the consequences of not pursuing their claims *in rem* against petitioner in the earlier cases was "garden variety . . . excusable neglect." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). This Court has held that such neglect does not support equitable tolling, *see id.*, and the dissenting judge below recognized that that principle should control respondents' attempt to evade the time bar, Pet. App. 4a.

More fundamentally, the Court in *Burnett* emphasized that the defendant was timely served with process in the first suit, meaning that it was on notice of the plaintiff's intent to pursue a claim against it. *See* 380 U.S. at 428-29, 434-35, 436. Here, by contrast, respondents failed to cause the arrest of petitioner in their original suits. *See* Pet. App. 8a. That failure is critical because arrest of the vessel in an action *in rem*, like service of process in an action *in personam*, is necessary to provide notice of the plaintiff's claim and of its intent to pursue that claim to judgment. The vessel must be arrested to provide proper notice because judgments *in rem* are good against the world. *See Rounds v. Cloverport Foundry & Mach. Co.*, 237 U.S. 303, 306 (1915) ("By virtue of dominion over the

thing all persons interested in it are deemed to be parties to the suit; the decree binds all the world, and under it the property itself passes, and not merely the title or interest of a personal defendant."); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1867) (same); Gilmore & Black 787. When, as here, the plaintiff has failed to cause the arrest of the vessel, persons with claims on the vessel – like third-party lienholders – receive no notice of the pending proceeding in which their interests could be extinguished. *See The Mary*, 13 U.S. (9 Cranch) 126, 144 (1815) (arrest of the vessel provides "constructive notice" to all interested parties). For that reason, courts ordinarily will not give effect to a purported judgment *in rem* when the vessel was not arrested. *See Thorsteinsson v. M/V Drangur*, 891 F.2d 1547, 1553 (11th Cir. 1990) ("No foreign judgment regarding admiralty and maritime issues . . . has been given effect by American courts absent arrest in rem of the vessel."). Respondents' failure to cause the arrest of the CHLOE Z in the original suits precludes any attempt by them to rely on those suits as fulfilling the notice function of the statute of limitations.

* * *

Contrary to the apparent belief of the panel majority below, no basis exists for tolling the statute of limitations in this case, and respondents' claims are time barred. As the Court recognized in *Baldwin County Welcome Center*, "[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." 466 U.S. at 152 (internal quotation marks omitted; alteration in original).

C. The Court's Review Is Warranted To Restore Uniformity In The Interpretation Of The Statute Of Limitations For Maritime Torts

The conflict created by the Ninth Circuit's decision in this case warrants this Court's review because it undermines congressionally intended uniformity in the time for

filing maritime tort claims, impairs predictability for litigants, and encourages forum shopping.

1. This Court repeatedly has recognized that the transitory nature of maritime commerce requires uniformity in the legal rules applicable to maritime actors. *See, e.g., Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 28-29 (2004) (recognizing the need for uniformity in maritime law). Regarding the question presented in this case, the demand for uniformity is even greater, because Congress's express purpose in enacting the statute at issue here was "to establish a *uniform* national statute of limitations for maritime torts." H.R. Rep. No. 96-737, at 1 (1980) (emphasis added); *accord Mink v. Genmar Indus., Inc.*, 29 F.3d 1543, 1547 (11th Cir. 1994) ("Congress intended to provide a uniform statute of limitations for all maritime personal injury and death torts."). By fostering disuniformity where Congress specifically intended uniformity, the decision below undermines Congress's purpose in enacting the statute, necessitating this Court's review.[10]

2. The Ninth Circuit's decision in this case also hampers litigants' ability to predict the appropriate time for filing maritime tort claims. Such unpredictability defeats a statute of limitations' primary purpose, which is to require a plaintiff "to put the adversary on notice to defend within the period of limitation." *Burnett*, 380 U.S. at 428 (internal quotation marks omitted). When a plaintiff fails to pursue or voluntarily dismisses a claim within the limitations period, he has not put the defendant on notice that it should be prepared to defend a possible later untimely claim. Furthermore, the Ninth Circuit's unprincipled extension of the tolling doctrine in this case infringes the

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[10] *See generally* Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 Tex. L. Rev. 1251, 1271-72 (1989) (when Congress's purpose in enacting a maritime statute is to establish uniformity, inconsistent interpretations of the legislation "undermine the essential purpose of the statute in a way that only the Supreme Court can correct").

defendant's "right to be free of stale claims" and permits "surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* (internal quotation marks omitted).

In addition, the unpredictability engendered by the decision below will affect a substantial number of cases. According to statistics from the Administrative Office of the United States Courts, more than 1,750 "marine" personal injury cases were commenced during the 12-month period ending June 30, 2005. *See Statistical Tables for the Federal Judiciary*, Table C-2 (June 30, 2005), *available at* http://www.uscourts.gov/stats/june05/C02jun05.pdf.

Moreover, those data understate the number of filings because they are derived from a form that permits a plaintiff to select only one "nature of suit" label to describe its case. *See* Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 Stan. L. Rev. 1275, 1286 & n.37 (2005).

3. Finally, by departing from the prevailing approach in other circuits, the Ninth Circuit's decision in this case encourages forum shopping. A plaintiff can bring an unseaworthiness claim against the vessel *in rem* in any judicial district in which the vessel is (or will be during the pendency of the suit) located, regardless of whether the forum has any other connection to the case. *See* Fed. R. Civ. P. Supp. R. C(2)(c). Similarly, under the broad venue provisions applicable in Jones Act cases, a plaintiff can bring suit in any judicial district in which its corporate employer is subject to personal jurisdiction. *See* 28 U.S.C. § 1391(b)-(c); *Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966). In light of those liberal venue rules, maritime personal-injury plaintiffs can exploit any disuniformity in the interpretation of the statute of limitations at issue here. Thus, it is all the more important for this Court to grant certiorari and restore the uniformity that Congress

intended when it enacted the statute of limitations for maritime tort actions.

* * *

The Ninth Circuit's decision in this case opens up an enormous loophole in the maritime statute of limitations. Left uncorrected, persons sustaining maritime injuries will be able to game the system in the circuit with the largest maritime workforce, as respondents were authorized to do, to evade the three-year limitations period. Because the proper rule to apply for the limitations period is of paramount importance in the sound and uniform administration of maritime personal-injury law, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL A. BARCOTT
HOLMES WEDDLE
& BARCOTT
999 Third Avenue
Suite 2600
Seattle, Washington 98104
(206) 292-8008

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7951

Counsel for Petitioner

December 29, 2006

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-15948
(D.C. No. CV-96-00055-JSU)

TCW SPECIAL CREDITS,
Plaintiff,

v.

FISHING VESSEL CHLOE Z,
Defendant – Appellee,

v.

ROBERT MATOS,
Plaintiff-intervenor,

AND

SLOBODAN PRANJIC,
Plaintiff-intervenor –
Appellant.

Appeal from the United States District Court
for the District of Guam
John S. Unpingco, District Judge, Presiding

Argued and Submitted March 17, 2006
San Francisco, California

[Filed June 5, 2006]

MEMORANDUM*

Before: NOONAN and HAWKINS, Circuit Judges, and REED,*** District Judge.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

*** The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

These actions by two injured seamen have already been twice before this court. On the first occasion, we affirmed the *in personam* judgments against the owner of the M/V Chloe Z. It developed that the owner was unable to pay and that its insurer had issued an indemnity policy that would pay only if the owner paid first. The second time before this court we remanded the case for a fact-finding hearing to see if misrepresentations about the insurance had misled the plaintiffs so that their *in rem* claims should not be barred by the three-year statute of limitations. *See* 46 App. U.S.C. § 763a (West 2005); *Usher v. M/V Ocean Wave*, 27 F.3d 370 (9th Cir. 1994) (per curiam). The district court subsequently and correctly found no misrepresentations and no equitable estoppel. The question, however, remains whether the plaintiffs' *in rem* action was barred by the statute of limitations.

The defendant vessel argues, with some plausibility, that implicit in our remand on the issue of equitable estoppel was a holding that, absent such estoppel, the statute of limitations was a bar. As the district court had in the first instance relied on equitable estoppel, it was natural to send the case back on this issue. Now that the equitable estoppel issue has disappeared, we address, for the first time, whether the *in rem* proceeding was barred by the statute of limitations.

The two plaintiffs filed both their *in personam* actions and their actions *in rem* against the vessel on May 11, 1994. The date was well within the three-year period. The vessel at first did not answer, and a default judgment was entered. But the vessel then appeared in the case and was allowed to respond to the plaintiffs' complaint. It does not lie in the vessel's mouth to assert that the suit was barred when the vessel itself willingly entered the litigation and made no mention of any statute of limitations bar.

Twice, stipulations were signed by counsel on both sides dismissing the vessel. On neither occasion were the stipulations signed or approved by the district court. The

stipulations were accordingly without validity. *See* D. Guam Ct. R. GR 3.1 (2006) (formerly codified as D. Guam Ct. R. 126.3 (1996)). The defendant has not challenged this rule.

We did not rule on the timelessness of the *in rem* claims at any earlier stage, although explicitly petitioned by the defendant to do so. The defendant, briefing this case, admitted that the *in rem* claims were alive ("pending") in July 1996, when the *in personam* claims came to trial. They did not merge with the *in personam* judgments of that year and remained pending until ruled upon, as they now are.

The plaintiffs' *in rem* judgments against the proceeds of the sale of the vessel are valid. Accordingly, the judgment of the district court is REVERSED, and the case is REMANDED for proceedings in accordance with this disposition.

REED, District Judge, dissenting:

I respectfully dissent. Only two issues are validly raised on this appeal: (1) whether the district court erred in determining that the Chloe Z was not equitably estopped from asserting the statute of limitations and (2) whether the district court erred in denying the injured seamen's motions to consolidate their *in rem* claims with TCW's mortgage foreclosure against the Chloe Z. Having concluded that neither of these decisions was error, the court nonetheless decides the case in favor of Appellants Matos and Pranjic by finding that the statute of limitations on their *in rem* claims was tolled by their abandoned 1994 *in rem* action against the Chloe Z.

As an initial matter, I agree with Appellee's contention that our 1999 remand on the issue of equitable estoppel implicitly held that, absent such estoppel, the statue [*sic*] of limitations was a bar. Accordingly, our reconsideration of that argument here is inappropriate, particularly given the six years of additional litigation our prior holding spawned.

Looking beyond the prior holding to the merits of the argument, I see no basis for tolling Appellants' claims against the Chloe Z. A claim may be tolled by statute or in equity. *See Nelson v. Int'l Paint Co.*, 716 F.2d 640, 645 (9th Cir. 1983). No statute tolled the Appellants' claims, so any tolling must be equitable. The doctrine of equitable tolling allows the court to toll the running of a statute of limitations "in situations were the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). In rejecting Appellants' equitable estoppel appeal, the court here accepts the district court's finding that Appellants' failure to pursue their 1994 *in rem* complaint against the Chloe Z was the product of poor judgment, not a defective pleading or any misconduct by the Chloe Z. This is tantamount to a finding that the decision not to try the 1994 *in rem* claims was "garden variety excusable neglect," which precludes equitable tolling. *Id.*

Because voluntary dismissal of a claim eliminates the possibility of tolling, the question of whether Appellants voluntarily dismissed their claims against the Chloe Z has become almost the dispositive issue in this case. The majority acknowledges that the parties twice stipulated to dismissal of the *in rem* claims against the Chloe Z, but finds that the stipulations had no effect because they did not comply with the District of Guam's Local Rule 3-2, which states that "stipulations shall not be effective unless approved by the judge." I cannot agree with this conclusion.

Although it is true that Judge Coughenour, the district court judge who presided over the 1994 lawsuit, did not *sign* the dismissal stipulations, he did *approve* them, which is all that Local Rule 3-2 requires. The record makes it clear that the parties discussed the dismissal of the *in rem* claims against the Chloe Z with Judge Coughenour at the May 1999 pre-trial conference when

they discussed the fact that the *in personam* defendant was going bankrupt and would likely not be able to pay any judgment. There is no doubt that Judge Coughenour knew of the stipulated dismissal and the possibility that Appellants would not be able to collect a judgment for their injuries from the *in personam* defendant. The fact that Judge Coughenour allowed the trial to go forward without the participation of Chloe Z evidences his tacit, if not explicit, approval of the dismissal.

In an attempt to shrug off these concerns, the disposition makes two assertions that directly contradict the record. First, the disposition states that "the defendant has not challenged [the District of Guam's Local Rule 3-2]." Contrary to that statement, the Chloe Z argued in its 1999 appeal that Local Rule 3-2 directly contradicts Federal Rule of Civil Procedure 41, which allows parties to stipulate to dismissal without court order. *See, e.g., American States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 888 & n.9 (9th Cir. 2003). If the district court's local rule contradicts the federal rule, the local rule is void. *See Atchison, Topeka and Santa Fe Ry. Co. v. Hercules Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998). This argument against the finding that the stipulated dismissals were invalid is not trivial, yet has been dismissed without analysis in our dispositions of both the current and the 1999 appeals. It is true that this argument was not raised in the current appeal, but neither was the issue of whether the plaintiffs' *in rem* claims were barred by the statute of limitations. Since we are revisiting the statute of limitations question, fairness dictates that we revisit the Chloe Z's arguments as to why the stipulated dismissals should be considered effective.

Along the same lines, the disposition claims that the Chloe Z admits that the stipulations were ineffective. Looking at the record as a whole, I do not believe it is fair to conclude that the Chloe Z admits that the *in rem* claims were still pending in 1996. The Chloe Z argued twice that the *in rem* action was not pending because of the stipulated dismissal in the 1994 lawsuit – once in its motion for

reconsideration of the District Court's denial of the Chloe Z's motion to vacate the Plaintiffs' warrant for arrest of the Chloe Z and once in its opposition brief in the 1999 appeal. Having seen this argument rejected by the District Court and ignored by the 1999 panel in its memorandum disposition, it is not surprising that Appellee argued here from the position that the *in rem* claim was still pending in July 1996 in this appeal. Further, it had nothing to lose by going along with the court's ruling, because the equitable estoppel hearing assumed that the statute of limitations would be a bar to the complaint-in-intervention, regardless of whether the *in rem* claim was pending in July 1996. If we had informed the parties that we were revisiting the issue of whether the statute of limitations had passed, I doubt that the Chloe Z would have accepted that the stipulated dismissals were ineffective without argument.

Moreover, regardless of whether the stipulated dismissals were effective, Appellants' failure to produce evidence and argument regarding their *in rem* claims during the 1996 trial on the first complaint acted as a voluntary dismissal of those claims, so it does not matter whether the *in rem* claims were still pending prior to trial. If the *in rem* claims were still pending when the other claims went to trial, Appellants had a duty to present evidence and argue those claims or face both waiver on appeal and claim preclusion in subsequent lawsuits. These doctrines exist, at least in part, to promote timely presentation of evidence and protect against stale claims – the same policies served by statutes of limitation. Accordingly, failure to produce evidence and argument in support of a claim during trial should be treated the same as a voluntary dismissal for purposes of tolling.

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

Civil Case No. 96-00055

TCW SPECIAL CREDITS, ET AL.,
Plaintiffs,

v.

F/V CHLOE Z, ET AL.,
Defendants.

ROBERT MATOS AND SLOBODAN PRANJIC,
Plaintiffs-in-Intervention,

v.

M/V CHLOE Z, ET AL.,
Defendants.

[Filed Apr. 8, 2004]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court for an evidentiary hearing on the 20th and 21st day of May 2003.[1] The Plaintiffs-In-Intervention, Robert Matos and Slobodan Pranjic, ("Matos and Pranjic") were represented by Dwight F. Ritter, Esq. and George Butler, Esq. The defendant, M/V Chloe Z ("Chloe Z") was represented by Michael A. Barcott, Esq. and Anita Arriola, Esq. The issues tried before the Court were: 1) whether the Chloe Z should be equitably estopped from raising a statute of

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[1] These cases were tried in July 1998 on Plaintiffs-in-Intervention, Robert Matos and Slobldan [*sic*] Pranjic's complaints *in rem* for personal injuries brought against the F/V Chloe Z. This Court rendered decisions in favor of Matos and Pranjic. Chole [*sic*] Z appealed the decisions. Thereafter, the Ninth Circuit reversed the decisions and remanded the matters to this Court to rule on two specific issues as discussed herein.

limitations defense, and 2) whether special circumstances exist that would justify denial of prejudgment interest to plaintiff, Mr. Matos.

THE COURT, having considered the evidence, oral and documentary, and the stipulations of the parties, hereby issues the following findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.[2]

FINDINGS OF FACT

1. The plaintiffs-in-intervention[3], Pranjic and Matos were seamen who suffered personal injuries on the fishing vessel Chloe Z. Pranjic was injured in 1991 and Matos was injured in 1992. Thereafter, they sought representation by the Law Offices of Dougherty & Hildre located in San Diego, California.

2. Trying to get jurisdiction over the defendant, the plaintiffs filed maritime claims for personal injuries in both state and federal courts in California and in the State Court of Hawaii. See Plaintiffs' Exhibits 1.1; 3, 4, 5, 7, 8, 10 and 11.

3. The plaintiffs dismissed all previously filed lawsuits in other jurisdictions, and filed their respective claims in Guam in 1994, Civil Case No. 94-00013 and Civil Case No. 94-000134. See Plaintiffs-in-intervention Exhibits 11 and 12. The plaintiffs filed actions both *in rem* and *in personam*. However, the plaintiffs never perfected their *in rem* cases by arresting the Chloe Z. In fact the *in rem* claims were never pursued prior to trial.[4] In

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[2] To the extent that a finding of fact should be deemed a conclusion of law, or a conclusion of law deemed a finding of fact, it shall so be considered.

[3] The plaintiffs-in-intervention, Pranjic and Matos, shall be referred to as plaintiffs herein.

[4] See Defendant's Exhibit Y, letter from Attorney Melançon to Attorney Dougherty, instructing Attorney Dougherty that because the defendant vessel Chloe Z was not served in the case, the *in rem* claims would have to be dismissed. In addition the Court takes judicial notice of the Joint Pretrial Statement of All Parties filed in the Slobodan

July 1996, the plaintiffs took their *in personam* cases to trial. The cases were tried and each of the plaintiffs were awarded substantial jury awards.

4. However, before the plaintiffs could recover on their *in personam* judgments, the Chloe Z effectively went out of business and there was no source of payment,

5. Realizing that there would be no recovery in the *in personam* cases, the plaintiffs sought to intervene in the present *in rem* case in December 1996.

6. Because the complaints in intervention were filed more than three years from the date of the injuries, Chloe Z raised the statute of limitations as a defense. In response the plaintiffs claimed that Chloe Z should be estopped from asserting that defense because of the defendant's actions in the original claim. Specifically, they claim that defense counsel made representations about insurance in the earlier actions which caused the plaintiffs to file their claims in the present case in an untimely manner.

7. The representation of which the plaintiffs complain concern one made early in the litigations.

8. When the cases were still in California, there was a mediation conference held before Judge Greer attended by attorneys James McMullen ("Mr. McMullen") and Donald F. Hildre ("Mr. Hildre"). When plaintiffs' counsel, Mr. Hildre became unhappy with the conference discussions he threatened to arrest the vessel. There is conflicting testimony as to whether counsel for Chloe Z, Mr. McMullen, asked Mr. Hildre to forego arresting the Chloe Z because there was "plenty of insurance." See Donald F. Hildre, Esq. testimony; see also Deposition Testimony of James McMullen, Esq., p.80:19 – p.81:25, March 28, 2001.

Pranjic Civil Case No. 94-00014, July 7, 1995, Docket No. 103, page 10, subsection (k) wherein it states "Claims against the vessel Chloe Z and . . . . are hereby dismissed." See also Defendant's Exhibit L, Joint Pretrial Statement of All Parties filed in the Robert Matos Civil Case No. 94-00013, July 3, 1995, page 12, subsection (k) wherein it states "Claims against the vessel Chloe Z and . . . . are hereby dismissed."

9. Although the plaintiffs claim that attorney McMullen made a representation regarding insurance in the early stages of the litigation, no testimony or evidence was presented concerning representations made by any other individuals which could have confused or mislead [*sic*] the plaintiffs.

10. The plaintiffs claim that the defendant misled the plaintiffs in their initial disclosures. In the defendant's initial disclosure statement made January 30, 1995, the defendant stated:

> 4. Substance of any insurance agreement that may cover any resulting judgment:
>
> > The owner has a protection and indemnity insurance policy which covers Chloe Z Vessel and Z Fishing Company, Inc. up to $25,000,000.00, subject to a $7,500.00 deductible. The policy insures against seaman injuries and covers the *typical protection and indemnity risk.* Consistent with standard P&I insurance policies, the subject policy would indemnify the owners should they be found liable for seamen injuries. (emphasis added).

See Joint Exhibit J1.

11. The term "protection and indemnity" insurance in the initial disclosure was adequate to place plaintiffs' counsel on notice that this policy may be a "pay to be paid" policy. The prevalent maritime personal injury insurance policy is the protection and indemnity policy which is basically a "pay to be paid" policy. See testimony of expert witnesses Carlton Russell, Esq. and David Ledger, Esq.

12. The policy is drafted to indemnify Chloe Z, not pay third parties. Under the terms of the policy Chloe Z would be reimbursed only after it paid the loss or expense. Absent payment by Chole [*sic*] Z to the plaintiffs there would be no recovery. See Declaration of Mark Jones, Defendant's Exhibit U.

13. A policy containing such a condition precedent to recovery is typically referred to as "pay to be paid" policy. Id., See Testimony of expert witnesses Carlton Russell, Esq. and David Ledger, Esq.

14. Based upon their experience in past cases, the plaintiffs' counsel understood that the insurance policy in force was a liability policy. In other words, plaintiffs believed the insurer would tender payment in satisfaction of any settlement reached or judgments rendered.

15. On or about July 11, 1996, a few days before the *in personam* cases were scheduled to be tried the Court held a conference with counsel. See Joint Exhibit J3, Letter from Jean Melançon, to William Dougherty and testimony of David Ledger, Esq.

16. At the conference, Attorney Ledger, counsel for the defendant, disclosed that Chloe Z Fishing Co., was in "dire financial straits." Counsel disclosed Chloe Z's financial situation to avoid being subsequently charged with misrepresentation. See Join [*sic*] Exhibit J2.

17. Moreover, Mr. Ledger informed the parties and the Court that if the matter proceeded to trial, the insurer would enforce the "pay to be paid" provisions of the policy and there could be problems with recovery. See Testimony of David Ledger.

18. Prior to the conference, the plaintiffs were aware of Chloe Z's financial problems. For example, in March 1996, plaintiffs counsel, Mr. William O. Dougherty wrote to Mr. Bernard from Arnold & Arnold, the adjuster for Sphere Drake, expressing his concern about the lack of payment for his client, Mr. Mazic's "maintenance and cure." He stated that in order to protect his client's interests he may have to undertake action to seize the Chole [*sic*] Z. See Defendant's Exhibit FF.

19. One month later, in April 1996, Mr. Dougherty wrote to Mr. Melançon regarding arrest of the vessel because Chloe Z had refused to pay the maintenance and cure of an injured seaman. See Defendant's Exhibit BB.

20. In fact, Mr. Dougherty's concerns were seemingly confirmed by co-counsel, Mr. Jean Melançon. Mr. Jean Melançon states in his April 26, 1996 letter to Mr. Dougherty that "[t]he various Z Fishing Companies appear to be in [a] tentative financial condition . . . This circumstance leads to me [*sic*] to conclude that the owner of the CHLOE Z could also file for bankruptcy." See Defendant's Exhibit CC.

21. In June 1996, Mr. Melançon was told by attorney Ledger, that the Chole [*sic*] Z was suffering financial difficulties and may file for bankruptcy protection. See Defendant's Exhibit Y.

22. The Court finds that months prior to the *in personam* trial, the plaintiffs were on notice regarding the defendant's financial difficulties and potential insolvency. Yet, despite such knowledge the plaintiffs failed to take any steps to ensure there would be a source of recovery.

23. At no time prior to the trial did the plaintiffs request to see the insurance policy to confirm what they were being told and to ensure recovery from the defendant's insurer. The defendant's initial disclosures simply did not tell enough about the insurance coverage such that the plaintiffs should have relied upon it. Additionally, once there were questions regarding the defendant's financial stability and insurance coverage it would have been prudent to seek the actual policy to review.

24. Nor, did the plaintiffs seek a Letter of Undertaking or a bond to further secure the plaintiff's interests.

25. It is the practice in the maritime industry to request Letters of Undertaking from underwriters to avoid the detention of vessels and the expense of posting security in other forms. See Testimony of Carlton Russell, Esq. In such a letter, the underwriter will agree on the behalf of its shipowner-assured to satisfy any judgment, usually up to a stipulated amount.

26. Even though the plaintiffs should have been or were in fact well aware of the defendant's financial difficulties and the potential problems with recovery given the

insurer's articulated position, they chose to only pursue their *in personam* cases.

27. An *in rem* cause of action creates a lien against the vessel or against the proceeds of any sale of the vessel to ensure that any judgment rendered would be satisfied.

28. The only source of recovery to the plaintiffs would have been the arrest of the vessel.

29. On July 11, 1996, the plaintiffs could have sought to arrest the vessel. Without coupling the *in rem* cause of action with their *in personam* actions, there was no reasonable basis for the plaintiffs to believe there would be recovery.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter herein and the parties hereto pursuant to 28 U.S.C. § 1332.

2. The plaintiffs sought *in rem* judgments for personal injuries suffered on the fishing vessel Chloe Z.

3. Pursuant to 46 U.S.C. § 763a, an *in rem* action based on maritime tort is subject to a three-year statute of limitations.

4. As noted, the injuries sustained by the plaintiffs occurred in 1991 and 1996 [*sic*], yet they did not seek to intervene in the *in rem* case until December 1996. Admittedly, the three-year statute of limitations had run, however, the plaintiffs claim that the defendant should be equitably estopped from raising a statute of limitations defense.

5. The burden to prove equitable estoppel is on the party claiming estoppel. See Santa Maria v. Pacific Bell, 202 F.3d 1170, 1177 (9th Cir. 1999). Such proof must be by clear, convincing, and satisfactory evidence. Cedar Creek Oil and Gas Company v. Fidelity Gas Company, 249 F.2d 277, 281 (9th Cir. 1957). Under Santa Maria, equitable estoppel requires the plaintiffs to show: 1) a material misrepresentation, also known as a fraudulent concealment, 2) reasonable reliance on the alleged repre-

sentation, and 3) a causal link between the alleged misrepresentation and the lapse of the statute of limitations. Id. In this instance, the plaintiffs will have to show that the defendant represented that the *in personam* judgment would be satisfied under the insurance policy, that the plaintiffs reasonably relied on those alleged representations, and that such reliance caused the statute of limitations to lapse on plaintiffs' *in rem* claims against the vessel.

6. In general there are two principal types of insurance for liability for personal injury to others. One type is liability insurance, which obligates an insurer to pay damages which the insured is legally liable to pay. The other type is indemnity insurance, which obligates the insurer to indemnify or reimburse the insured to up to the extent that the insured himself has actually paid damages. Appleman, *Insurance Law & Practice* (Buckley ed.), § 4261 (1979).

7. "The chief difference between a liability policy and an indemnity policy is that under the former a cause of action accrues when the liability attaches, while under the latter there is no cause of action until the liability has been discharged, as by payment of the judgment by the insured. That is, under an indemnity policy the insured must have suffered an actual money loss before the insurer is liable." Id.

8. It is clear to this Court that the Chloe Z purchased a marine policy of indemnity rather than a liability policy.

9. Based upon Attorney McMullen's alleged representation during a mediation conference in 1994 regarding insurance, the plaintiffs' counsel agreed to forego arresting the vessel. However reasonable the Court finds the decision to forego arresting the vehicle at that time, the Court does not find the decision reasonable after counsel learned that the Chloe Z was suffering financially. Moreover, counsel was told very clearly during the pretrial conference with Judge Coughenour that there would be no recovery by the underwriter until the owner of the vessel

first paid on the judgment. Yet, instead of asking for the trial to be postponed in order to intervene in the present *in rem* case or at least request a copy of the insurance policy to verify opposing counsel's representations, counsel decided to go forward with the *in personam* trials.

10. Unfortunately, the plaintiffs' counsels' failure to appreciate the nature of the "indemnity" policy caused the plaintiffs to forego pursuing their *in rem* claims in the earlier litigation. The Court does not find that there was any misrepresentation by the defendant which rises to the level of a material or fraudulent misrepresentation. In fact, given the testimony of Mr. Ledger, the Court finds that the plaintiffs were told exactly what they could expect from the underwriters should they prevail at trial and the defendant become insolvent. The Court finds Mr. Ledger's testimony credible. Moreover, Mr. Ledger's testimony is supported by opposing counsel, Jean Melançon's letter of July 11, 1996 to co-counsel, Mr. Dougherty.

11. The next issue concerns whether Matos should have been entitled to prejudgment interest. However, the Court need not reach the resolution of this issue because it finds that the plaintiffs' *in rem* causes of action are in fact time barred by the statute of limitations.

In accordance with the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that upon consideration of the evidence produced at trial that Judgment shall be entered in FAVOR of the Defendants. Accordingly, the prior Judgments entered in favor of the plaintiffs are hereby VACATED. Each party to bear its own costs and attorney's fees.

SO ORDERED this 8th day of April, 2004.

/s/ JOHN S. UNPINGCO
JOHN S. UNPINGCO
District Judge

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

Civil Case No. 96-00055

TCW SPECIAL CREDITS, ET AL.,
Plaintiffs,

v.

F/V CHLOE Z, ET AL.,
Defendants.

ROBERT MATOS AND SLOBODAN PRANJIC,
Plaintiffs-in-Intervention,

v.

M/V CHLOE Z, ET AL.,
Defendants.

JUDGMENT

Judgment is hereby entered in accordance with the Findings of Fact and Conclusions of Law filed April 8, 2004.

Dated this 9th day of April, 2004, Hagatna, Guam.

MARY L.M. MORAN
Clerk of Court

By: /s/ [illegible]
Deputy Clerk

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

Civil Action 94-00013

ROBERT MATOS,
Plaintiff,

v.

CHLOE Z FISHING COMPANY, INC., ET AL.,
Defendants.

[Filed July 12, 1995]

PRETRIAL CONFERENCE ORDER

Following pretrial proceedings, pursuant to Rule 16, Federal Rules of Civil Procedure and Local Rule 237,

IT IS ORDERED:

1. (a) This is an action for personal injuries and damages incurred by the plaintiff while he was working as a commercial fisherman aboard defendant's tuna seiner, the M/V CHLOE Z, on behalf of plaintiff's employer CHLOE Z FISHING COMPANY, INC.

(b) The parties are:

Plaintiff ROBERT MATOS.

Defendants CHLOE Z FISHING COMPANY, INC., TUNA CLIPPER SERVICES and ZEE ENTERPRISES, INC.

Each of these parties has been served and has appeared. All other parties named in the pleadings and not identified in the preceding paragraph are now dismissed.

(c) The pleadings which raise the issues are:

Plaintiff's Complaint filed herein on May 11, 1994.

Defendants' Answer filed herein on December 22, 1994.

2. Jurisdiction and venue are invoked on the following grounds. This is a commercial fisherman's claim for damages and for personal injuries under the General Maritime Laws of the United States of America, and the Merchant Seaman's Act of June 5, 1920, otherwise known as the Jones Act (46 U.S.C. 688), and said facts are admitted for purposes of this proceeding.

3. The following facts are admitted and require no proof:

(a) The allegations of jurisdiction and venue as net forth in Paragraph 2 above.

(b) That on or about mid July, 1992 and August 8, 1992, the time of the alleged incidents herein, CHLOE Z FISHING COMPANY, INC., was the owner and operator of the M/V CHLOE Z.

(c) That on or about mid July, 1992 and August 8, 1992, at the time of the alleged accidents herein, plaintiff was employed by CHLOE Z FISHING COMPANY, INC., as a crew member aboard the vessel CHLOE Z.

4. The reservations as to the facts recited in paragraph 3, above, are as follows:

None.

5. The following facts, though not admitted, are not to be contested at trial by evidence to the contrary:

None.

6. The following issues of facts, and no others, remain to be litigated at the trial:

(a) Were the defendants negligent in any of the following respects:

(1) By failing to exercise due care in providing plaintiff with a reasonably safe place in and about which to work during his first and second accidents;

(2) By failing to use reasonable care in selecting a reasonably safe work method in connection with allowing the vessel's unloaders to negligently throw bombs into the fish wells to loosen up the fish causing a PVC pipe to break, resulting in plaintiff's second accident.

(b) Whether if the conditions described in paragraph 6(a) existed, or any of them, defendants' vessel was thereby rendered unseaworthy.

(c) Whether plaintiff suffered injuries to his low back and leg.

(d) Whether plaintiff was solely or contributorily negligent in causing his own claimed injuries.

(e) If plaintiff was contributorily negligent, the proportion of plaintiff's negligence to the total causation.

(f) Whether plaintiff's injuries are barred by the primary duty rule.

(g) The nature and extent of the injuries to plaintiff's low back and leg as a proximate result of any negligence or unseaworthiness of the defendants.

(h) Whether plaintiff suffered the following special damages as a result of said injuries:

(1) Loss of wage earnings to date;

(2) Present value of net future lost wage earnings;

(3) Future medical costs of surgery, as necessary, to and including follow-up medical care, as necessary.

(i) Whether plaintiff is entitled to general damages to date and to general damages in the future, including pain and suffering and, if so, the amount thereof.

(j) Whether plaintiff has failed to mitigate his damages and, if so, the amount thereof.

7. The following issues of law and no others remain to be litigated at the trial:

(a) Plaintiff submits:

(1) Whether the vessel CHLOE Z was in unseaworthy condition at the time of plaintiff's accident.

(2) Whether the defendants were negligent in causing plaintiff's injuries by failing to provide plaintiff with a safe place in which to work.

(3) Whether plaintiff suffered injuries as a proximate result of the crew's negligence and/or the unseaworthiness of the CHLOE Z.

(4) Whether or not plaintiff himself was solely or contributorily negligent in failing to exercise reasonable care for his own safety at the time of his accident and injuries.

(b) Defendants submit:

(1) Whether under the Jones Act, 46 U.S.C. § 688, Defendants' fault or negligence can be based on an action or inaction notwithstanding Defendants' lack of knowledge of the probable results of the conduct.

(2) Whether the Jones Act provides for strict liability against a defendant vessel owner/employer.

(3) Whether the standard of care required in Jones Act cases is that of the ordinary, prudent person under like circumstances.

(4) Whether a crewmember's occupation necessarily involves the ordinary risks of his or her calling.

(5) Whether negligence on the part of Plaintiff contributed to his own injuries and concomitantly reduced Plaintiff's recoverable damages.

(6) Whether there is a presumption of negligence merely because an accident has happened aboard a vessel, and which party bears the burden of proof to produce evidence that convinces a jury by a preponderance of the evidence that the defendant was in fact negligent.

(7) Whether the doctrine of unseaworthiness requires that a plaintiff prove that an appliance on the vessel which he claims causes injury was an appurtenance of the ship and that it was not reasonably fit for its intended use.

(8) Whether an inference of unseaworthiness can be drawn from the mere happening of an accident.

(9) Whether unseaworthiness is an objective standard, defined in terms of reasonable safety for seamen of normal physical characteristics, knowledge and prudence.

(10) Whether an unusual, unexpected or isolated accident may be the basis for unseaworthiness.

(11) Whether an unsafe condition must exist for an extended period of time prior to the alleged accident for the doctrine of unseaworthiness to apply.

(12) Whether plaintiff must prove that the alleged unseaworthy condition was the proximate cause of his or her injuries.

(13) Whether a seaman can recover from the shipowner under the doctrine of unseaworthiness when a seaman's injury resulted from his own negligent use of otherwise seaworthy equipment.

(14) Whether in this admiralty action, the doctrine of comparative negligence is applicable to deciding the final award for plaintiff.

(15) Whether an experienced crewmember who independently chooses to lift heavy vessel equipment, without the assistance of other crewmembers who were available to assist him, who has authority to have the other crewmembers assist with the lifting of the equipment, and who is not ordered or advised to lift the equipment by himself, is fully responsible for his own injuries resulting from that conduct.

(16) Whether pursuant to the "Primary Duty Rule," Defendants can be held liable for injury to Plaintiff caused by his own failure to properly perform a duty or to safely perform a repair of a known problem which could have been safely repaired.

(17) Whether pursuant to the "Primary Duty Rule," once a dangerous condition has been identified and a seaman has been assigned to fix that condition, that seaman is charged with knowing the reasonable and safe means to

effectively remedy the situation, and whether Plaintiff cannot then recover from the vessel owner for any resulting injuries.

(18) Whether Plaintiff's extraordinary negligent acts which caused the alleged accident superseded and served to cutoff liability for any prior acts or omissions by Defendants.

(19) Whether punitive damages are available on claims for unpaid maintenance and cure.

8. All discovery is complete.

9. The Joint Exhibit List of the parties has heretofore been filed with the Court as required by Local Rule 237-7. All exhibits may be admitted without objection, except those exhibits listed below:

Plaintiff objects to Exhibit Letters O, Q, R, T, U, V, Y, Z, AA, AB, AC, AD, AH, AI, AL, BF, BG, BH, BI, BJ, BK, BL, BM, BO, BP, CA, CB, CC, CD, CE, CF, CG, CH, CI, CJ, CK, CL, CM, CN, CV, CW, CX, CY, CZ, DA, and DB.

Defendants object to Exhibit Nos. 1 through 19, inclusive.

The objections are separately stated and attached hereto.

10. Witness Lists of the parties have heretofore been filed with the Court as required in Local Rule 237-6. (Except for good cause shown, only the witnesses identified in the list will be permitted to testify, other than for rebuttal or impeachment).

11. Each party intending to present evidence by way of deposition testimony has or will mark such depositions in accordance with Local Rule 230-2(b). For this purpose, the following depositions shall be lodged with the Clerk as required by Local Rule 230-2(b):

(a) Guido Moraro;

(b) David Leinert;

(c) Dragan Kolega;

(d) Milovan Vidov;

(e) Vjekoslav Gobin;

(f) Peter Lipanovich;

(g) Richard Jones, Ph.D.;

(h) Robert Wallace, C.P.A.;

(i) Sidney H. Levine, M.D.;

(j) Robert Patterson;

(k) H. Douglas Engelhorn, M.D.;

(l) Plaintiff Robert Matos;

(m) Roger Thrush;

(n) Dr. Raymond Vance;

(o) Dr. Marc Kalish; and

(p) George Copitas, Chief Engineer.

12. The following law and motion matters are contemplated:

Plaintiff contends that there should not be a bifurcation of issues. Defendants may move the Court for bifurcation of the issues of liability and damages.

13. Bifurcation of the following issues for trial is ordered.

None.

14. The trial is to be a jury trial. At least seven days prior to the trial date counsel shall serve on all parties and lodge with the Court the proposed voir dire questions, and forms of verdict as required by Local Rule 239-1(b) and joint proposed jury instructions as required by Local Rule 239-1(a).

15. The trial is estimated to take 6 – 7 trial days.

16. The trial of this case will be held on the fourteenth (14) day of August 1995, at 9:30 a.m.

17. The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this Pretrial Conference Order shall supersede the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Executed on July ____, 1995

JOHN S. UNPINGCO
District Judge

APPROVED AS TO FORM
AND CONTENT:

LAW OFFICES OF
DWIGHT F. RITTER

McCULLY, LANNEN,
BEGGS & MELANCON,
P.C.

Attorneys for Plaintiff

/S/ JEAN MELANCON

BY: DWIGHT F. RITTER
JEAN MELANCON

CARLSMITH, BALL, WICHMAN
CASE & ICHIKI

Attorneys for Defendants

/S/ LISANNE M. BUTTERFIELD

BY: DAVID P. LEDGER
LISANNE M. BUTTERFIELD

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

Civil Action 94-00014

SLOBODAN PRANJIC,
Plaintiff,

v.

CHLOE Z FISHING COMPANY, INC., ET AL.,
Defendants.

[Filed July 12, 1995]

PRETRIAL CONFERENCE ORDER

Following pretrial proceedings, pursuant to Rule 16, Federal Rules of Civil Procedure and Local Rule 237,

IT IS ORDERED:

1. (a) This is an action for:

Personal injuries and: damages incurred by the plaintiff while he was working as a commercial fisherman aboard defendants' tuna seiner, the M/V CHLOE Z on behalf of plaintiff's employer CHLOE Z FISHING COMPANY, INC.

(b) The parties are :

Plaintiff SLOBODAN PRANJIC.

Defendants CHLOE Z FISHING COMPANY, INC., TUNA CLIPPER SERVICES and ZEE ENTERPRISES, INC.

Each of these parties has been served and has appeared. All other parties named in the pleadings and not identified in the preceding paragraph are now dismissed.

(c) The pleadings which raise the issues are:

Plaintiff's Complaint filed herein on May 11, 1994.

Defendant's Answer filed herein on December 22, 1994.

2. Federal Jurisdiction and venue are invoked upon the following grounds:

This is a commercial fisherman's claim for damages for personal injuries under the General Maritime Laws of the United States of America, and the Merchant Seaman's Act of June 5, 1920, otherwise known as the Jones Act (46 USC § 688), and said facts are admitted for purposes of this proceeding.

3. The following facts are admitted and require no proof:

(a) The allegations of jurisdiction and venue as set forth in Paragraph 2 above.

(b) That on or about November 25, 1991, at the time of the alleged accident herein, CHLOE Z FISHING COMPANY, INC., was the owner and operator of the M/V CHLOE Z.

(c) That on or about November 25, 1991, at the time of the alleged incident herein, plaintiff was employed by CHLOE Z FISHING COMPANY, INC., as a crew member aboard the vessel CHLOE Z.

4. The reservations as to the facts recited in Paragraph 3, above, are as follows:

None.

5. The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary:

None.

6. The following issues of fact, and no others, remain to be litigated at the trial:

(a) Were the defendants negligent in any of the following respects:

(1) By failing to exercise due care in providing plaintiff with a reasonably safe place in and about which to work;

(2) By failing to use reasonable care in selecting a reasonably safe work method in connection with the manner in which plaintiff was to transfer from the vessel

CHLOE Z to the vessel MILAGROS Z while the two vessels were on the high seas;

(3) By failing to properly instruct and train crew members in the proper method to transfer from one vessel to another vessel while they were on the high seas.

(b) Whether if the conditions described in paragraph 6(a) existed, or any of them, defendants' vessel was thereby rendered unseaworthy.

(c) Whether plaintiff suffered injuries to his left distal tibia and ankle as a proximate result of said unseaworthiness or negligence or both.

(d) Whether plaintiff was solely or contributorily negligent in that at the time of his injuries, he failed to exercise reasonable care for his own safety.

(e) If plaintiff was contributorily negligent, the proportion of plaintiff's negligence to the total causation.

(f) The nature and extent of the injuries to plaintiff's left leg and ankle as a proximate result of any negligence or unseaworthiness of the defendants.

(g) Whether plaintiff suffered the following special damages as a result of said injuries:

(1) Loss of wage earnings to date;

(2) Present value of net future lost wage earnings;

(3) Future medical costs of surgery, as necessary, to and including follow-up medical care, as necessary.

(h) Whether plaintiff is entitled to general damages to date and to general damages in the future, including pain and suffering and, if so, the amount thereof.

(i) Whether plaintiff has failed to mitigate his damages and, if so, the amount thereof.

7. The following issues of law, and no others, remain to be litigated at the trial:

(a) Plaintiff submits:

(1) Whether the vessel CHLOE Z was in an unseaworthy condition at the time of plaintiff's accident.

(2) Whether the defendants were negligent in causing plaintiff's injuries by failing to provide plaintiff with a safe place in which to work.

(3) Whether plaintiff suffered injuries as a proximate result of the CHLOE Z's unseaworthiness and/or the negligence of its crew.

(4) Whether or not plaintiff himself was solely or contributorily negligent in failing to exercise reasonable care for his own safety at the time of his accident and injuries.

(b) Defendants submit:

(1) Whether under the Jones Act, 46 U.S.C. § 688, fault or negligence can based [*sic*] on an action or inaction notwithstanding Defendants' lack of knowledge or notice of the probable results of the conduct.

(2) Whether the Jones Act provides for strict liability against a defendant vessel owner/employer.

(3) Whether the standard of care required in Jones Act cases is that of the ordinary, prudent person under like circumstances.

(4) Whether a crew member's occupation aboard a commercial fishing vessel necessarily involves the ordinary risks of his or her calling.

(5) Whether there is a presumption of negligence merely because an accident has happened aboard a vessel, and whether plaintiff bears the burden of proof to produce evidence which convinces a jury by a preponderance of the evidence that the defendant was in fact negligent.

(6) Whether an employer can be held liable under the Jones Act when obvious and well-known risks of fishing are involved and a seaman's employer is not violating the industry-wide standard of care.

(7) Whether negligence on the part of a plaintiff contributing to his own injuries concomitantly reduces the plaintiff's recoverable damages.

(8) Whether the doctrine of unseaworthiness requires that a plaintiff prove that an appliance on the ves-

sel which he claims caused injury was an appurtenance of the ship and that it was not reasonably fit for its intended use.

(9) Whether an inference or [*sic*] unseaworthiness can be drawn from the mere happening of an accident.

(10) Whether unseaworthiness is an objective standard, defined in terms of reasonable safety for seamen of normal physical characteristics, knowledge and prudence.

(11) Whether an unusual, unexpected or isolated accident may not be the basis for unseaworthiness.

(12) Whether an unsafe condition must exist for an extended period of time prior to the alleged accident for the doctrine of unseaworthiness to apply.

(13) Whether plaintiff must prove that the alleged unseaworthy condition was the proximate cause of his or her injuries.

(14) Whether a seaman can recover from the shipowner under the doctrine of unseaworthiness when a seaman's injury resulted from his own negligent use of otherwise seaworthy equipment.

(15) Whether plaintiff may not recover if his accident was caused solely by his own negligence or if his negligence was the sole cause of an unseaworthy condition.

(16) Whether in this admiralty action, the doctrine of comparative negligence is applicable to deciding the final award for a contributorily negligent plaintiff.

(17) Whether employment as a seaman upon a fishing vessel involves inevitable hazards, some of which are very severe in nature and are not occasioned by negligence or unseaworthiness. Such risks must be borne by those who are working as fishermen as no person may recover damages for injuries resulting solely from the hazards of his occupation as a seaman.

(18) Whether a seaman, who makes a unilateral decision to manhandle a piece of equipment in a knowingly unsafe manner, is either solely responsible for his

injury, or if the employer's negligence contributed to causing the accident, the seaman should be found contributorily or comparatively negligent.

(19) Whether a seaman cannot recover on the basis of an unsafe condition which is due to a failure on his part to perform his responsibilities.

(20) Whether plaintiff's extraordinary negligent acts which cause an accident supersede and serve to cutoff liability for any prior acts or omissions by a vessel owner.

(21) Whether punitive damages are available on claims for unpaid maintenance and cure.

8. All discovery is complete.

9. The Joint Exhibit List of the parties has heretofore been filed with the Court as required by Local Rule 237-7. All exhibits may be admitted without objection, except those exhibits listed below:

Plaintiff objects to. Defendants Exhibit Nos. Q, R, Y, Z, DD, EE, LL, MM, NN, OO, PP, QQ, HHH, III, JJJ, KKK, LLL, MMM, NNN, OOO, PPP, QQQ, XXX, BBBB, CCCC, DDDD and HHHH.

Defendants object to Exhibit Nos. 1 through 16, inclusive.

The objections are separately stated and attached hereto.

10. Witness Lists of the parties have heretofore been filed with the Court as required in Local Rule 237-6.

11. Each party intending to present evidence by way of deposition testimony has or will mark such depositions in accordance with Local Rule 230-2(b). For this purpose, the following depositions shall be lodged with the Clerk as required by Local Rule 230-2(b):

(a) Jordan Blaslov;

(b) Burcell Denko;

(c) Ratko Blaslov;

(d) Peter Lipanovich;

(e) Vjekoslav Gobin;

(f) Ernest Vidov;

(g) Robert Matos;

(h) Joe Lipanovich;

(i) Richard C. Richley, M.D.;

(j) Robert Wallace, C.P.A.;

(k) Richard Jones, M.D.;

(l) Slobodan Pranjic;

(m) Milovan Vidov;

(n) Jan A. Bollinger, M.D.;

(o) Jurgen Unterberg, Captain;

(p) Thomas Laughlin, M.D.;

(q) Sidney Levine, M.D.;

(r) Michael Zirpolo, M.D.;

(s) Roger Thrush;

(t) Louis A. Rose, Ph.D.;

(u) Harold Medina, Captain;

(v) Greg Chase, Captain; and

(w) Benjamin Stillwell, M.D.

12. The following law and motion matters are pending or contemplated:

Plaintiff contends that there should not be a bifurcation of issues. Defendants may move the Court for bifurcation of the issues of liability and damages.

13. Bifurcation of the following issues for trial is ordered.

None.

14. Trial by jury:

The trial is to be a jury trial. At least seven days prior to the trial date counsel shall serve on all parties and lodge with the court the proposed voir dire questions, and forms of verdict as required by Local Rule 239-1(b), and joint proposed jury instructions as required by Local Rule 239-1(a).

15. The trial is estimated to take 6 to 7 trial days.

16. The trial of this cause will be held on the seventh (7) day of August 1995, at 9:30 a.m.

17. The foregoing admissions having been made by the parties, and the parties have specified the foregoing issues of fact and law remaining to be litigated, this Pretrial Conference Order shall supersede the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

SO ORDERED this ___ day of _____, 1995.

HONORABLE JOHN S. UNPINGCO
District Judge
District Court of Guam

APPROVED AS TO FORM AND CONTENT:

LAW OFFICES OF
DWIGHT F. RITTER

McCULLY, LANNEN,
BEGGS & MELANCON,
P.C.

By: /S/ JEAN MELANCON

DWIGHT F. RITTER
JEAN MELANCON
Attorneys for Plaintiff

LITTLER, MENDELSON,
FASTIFF, TICHY &
MATHIASON

CARLSMITH, BALL, WICHMAN
CASE & ICHIKI

By: /S/ LISANNE M. BUTTERFIELD

DAVID P. LEDGER
LISANNE M. BUTTERFIELD
Attorneys for Defendants

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

Civil Action 94-00014

SLOBODAN PRANJIC,
Plaintiff,

v.

CHLOE Z FISHING COMPANY, INC., ET AL.,
Defendants.

[Filed July 26, 1996]

JUDGMENT

This action came before the Court July 15 through July 19, 1996, for trial before a Jury. The Jury rendered its verdict on July 19, 1996. The Court now incorporates that verdict into the following final judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Judgment is entered in favor of plaintiff Slobodan Pranjic ("Pranjic") and against Chloe Z Fishing Company, Inc., for the sum of Seven Hundred Sixty Five Thousand and No/100 ($765,000.00) Dollars.

2. Interest shall accrue on the amount set forth in paragraph 1 from the date this judgment is entered, at the rate of 5.89 per cent, in accordance with 28 U.S.C. 1961.

3. Pranjic is also awarded his costs which shall be determined in accordance with 28 U.S.C. 1920. This judgment shall be deemed to include those costs allowed by this Court or the Clerk of Court.

Executed on July 26, 1996

/s/ JOHN C. COUGHENOUR
JOHN C. COUGHENOUR
District Judge

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

Civil Action 94-00013

ROBERT MATOS,
Plaintiff,

v.

CHLOE Z FISHING COMPANY, INC., ET AL.,
Defendants.

[Filed Aug. 19, 1996]

JUDGMENT

This action came before the Court July 23 through July 26, 1996, for trial before a Jury. The Jury rendered its verdict on July 26, 1996. The Court now incorporates that verdict into the following final judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Judgment is entered in favor of plaintiff Robert Matos ("Matos") and against Chloe Z Fishing Company, Inc., for the sum of One Million Four Hundred Ninety Seven Thousand Nine Hundred Fifty Five and No/100 ($1,497,955.00) Dollars.

2. Interest shall accrue on the amount set forth in paragraph 1 from the date this judgment is entered, at the rate of 5.81 per cent, in accordance with 28 U.S.C. 1961.

3. Matos is also awarded his costs which shall be determined in accordance with 28 U.S.C. 1920. This judgment shall be deemed to include those costs allowed by this Court or the Clerk of Court.

Executed on August 13, 1996

/s/ JOHN C. COUGHENOUR
JOHN C. COUGHENOUR
District Judge

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

Case No. CV 94-00013

ROBERT MATOS,
Plaintiff,
v.

CHLOE Z FISHING COMPANY, INC.,
Defendant.

Case No. CV 94-00055

TCW SPECIAL CREDITS, *ET AL.*,
Plaintiffs and
Plaintiffs-in-Intervention,
v.

F/V CHLOE Z, HER ENGINES, TACKLE, APPAREL AND FURNITURE, ETC., *IN REM, ET AL.*,
Defendants.

[Filed Nov. 18, 1996]

MEMORANDUM ORDER

This matter came before this Court on Plaintiff Robert Matos ("Matos") Federal Rule of Civil Procedure 42(a) ("Rule 42") Motion for Consolidation. Matos requests this Court, under the authority of Rule 42, consolidate Robert Matos v. Chloe Fishing Company, Inc., in personam, CV94-00013 (the "Matos case") with TCW Special Credits v. F/V Chloe Z, in rem, et al., CV96-00055 (the "TCW action"). This Court has reviewed the motion and memoranda on file and has considered the arguments of counsel presented at the Friday, November 15, 1996 Motion Hearing. For the reasons explained on the record and in this

Memorandum Order Plaintiff Matos' Motion is hereby DENIED.

Matos is the plaintiff in CV94-00013. After a multiple day trial in July 1996, Matos prevailed in his maritime personal injury case (Jones Act Negligence and Unseaworthiness) against the Chloe Z Fishing Company, in personam. A final judgment was entered on August 16, 1996. Matos now, over two months after the conclusion of the trial, brings this motion to consolidate. This request is based on the principal contention that there exists a common question of law as to the status of his alleged maritime and judgment liens with other lien holders in an unrelated in rem action against F/V Chloe Z – the TCW action.

The TCW action is a separate admiralty case filed in early August 1996 by TCW, the preferred ship mortgagee, against (among others) F/V Chloe Z, in rem. The vessel was arrested and is currently pending a Supplemental Rule E Interlocutory Sale. There are several Plaintiffs-in-Intervention: Shell; Clipper Oil; Starkist; and the Crewmembers. Therefore, there are also several claimants in competition for the limited funds expected from the vessel sale. The in personam defendant Chloe Z Fishing Company is a party to this action; however, the corporation has failed to appear and is therefore in default. Therefore, for practical terms the only defendant in the TCW case is the res, the F/V Chloe Z.

The determination of whether to consolidate civil cases is governed by Federal Rule of Civil Procedure 42(a), which states:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all actions consolidated; and it may make such orders concerning the proceedings therein as may tend to avoid unnecessary costs or delay.

Rule 42(a)'s objective is to provide a procedural mechanism whereby the court or the parties may move to join or

consolidate actions or issues in an effort to expedite litigation, improve docket control and advance judicial economy. The trial judge is given broad discretion in Rule 42(a) determinations. Each determination must be made with special attention to the facts and context of the case – balancing the competing interests. Based on a review of the parties [*sic*] arguments this Court has determined that Rule 42 consolidation is not proper in this case. The following factors were considered significant in making this determination.

First, Rule 42 is designed to apply to "pending" cases. Fed.R.Civ.P. 42(a) ("When actions involving a common question of law or fact are pending before the court. . .") (emphasis added). The trial in the Matos case was held in July 1996 and judgment was entered. The Matos case is over. In fact, pursuant to The Guide to Judicial Policy and Procedures, the Clerk of Court closed this case upon the entry of final judgment. In light of this procedural status, this Court, applying a practical and plain language definition, cannot state that this case is "pending" as intended by the Federal Rules. See also Fed.R.Civ.P. 1. Therefore, as a threshold matter this Court finds that Rule 42(a) does not provide authority for this Court to order consolidation of this case.

Second, Plaintiff Matos contends that there exists a common question law in each of the two cases. In support of this contention Matos argues:

> There being no disputed facts, the determination of the priorities among liens is a question of law. In re Patterson, 139 Bankr. 229 (9th Cir. 1992). Here Plaintiff, MATOS has a maritime lien against the Chloe Z in the Amount of the judgment entered. Plaintiffs TCW and Plaintiffs-in-Intervention also claim prospective liens against the Chloe Z. Which plaintiffs have priority over each other is a question of law. Plaintiff Matos Memorandum Filed October 22, 1996 at page 4.
>
> MATOS has a valid in rem claim against the CHLOE Z and is therefore entitled to participate in

> the proceedings involved in the foreclosure sale, and distribution of the sale funds. Granting consolidation would afford MATOS the right to assert his claim to proceeds from the sale of the Vessel with the other Plaintiffs. Plaintiff Matos Reply Memorandum Filed November 12, 1996 at page 4.

This Court does not concur with counsel for Plaintiff Matos that these or any other matters have created a common question of law and fact between these two cases. This determination is based on the following analysis.

To begin, it cannot be disputed that Matos may have a valid in rem claim against F/V Chloe Z or that he may be "entitled to participate in the proceedings involved in the foreclosure sale, and distribution of the sale funds." However, this independent fact does not "entitle" Matos to become "involved" through procedural consolidation of these cases.

The source of the potential maritime lien is his actual personal injury not his in personam judgment in CV94-00013. The fact that the Matos case was brought in personam and the Chloe Z foreclosure case is in rem cannot be disregarded. This jurisdictional distinction makes the argument that there exists a commonality of any issues between these cases somewhat dubious. The original Matos case (CV94-00013) was a Jones Act/Unseaworthiness in personam action. The Chloe Z foreclosure case (CV96-00055) is a Supplemental Rule C in rem action. Jones Act cases are directed toward the vessel owner and do not present or create any legal or factual questions as to the creation or priority of a maritime tort lien; such determinations are properly made by in rem actions against maritime property. Plamas v. The Piner Del Rio, 277 U.S. 151, 1926 AMC 932 (1926); Gilmore and Black, The Law of Admiralty, §6-22 and §9-20; see also Fed.R.Civ.P. Supplemental Admiralty Rule C. Therefore, a seaman's personal injury claim based on the Jones Act does not create a maritime lien but rather it is a judgment lien – subordinated to all valid maritime liens. Id. Accordingly, Matos' unsupported claim that the alleged common question

arises as a result of his "maritime lien against the Chloe Z in the Amount of the judgment entered" is misleading. Plamas v. The Piner Del Rio, 277 U.S. 151, 1926 AMC 932 (1926); Pratt v. United States, 340 F.2d 174 (1st Cir. 1964) (unsatisfied in personam judgement is not res judicata against mortgagee or other lienors). It follows that the Matos case, plead in personam not in rem, does not give rise to questions of the nature or priority maritime liens[1]. Determining the priorities among maritime liens is an issue only in the in rem action not in the original Matos case. In sum, Matos is correct that he may have a valid, tort-based (preferred) maritime lien against F/V Chloe Z and that the question of whether this maritime lien has priority over other liens is a question of law; however, as the original Matos case was brought in personam it never raised nor addressed any of these "maritime lien" issues. Therefore, any alleged commonality is not the result of the factual or legal issues brought before this Court

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[1] Nevertheless, the Court notes that the mere fact that an injured seaman has a valid non-maritime, judgment lien does not preclude him from filing a separate in rem action against the vessel based on a claim of a maritime lien based on tort. But see 46 App U.S.C.A. §463a (legislating a three-year statute of limitations for maritime liens (including personal injury) brought against a vessel in rem); Usher v. M/V Ocean Wave 27 F.3d 370 (9th Cir. 1994). As examined by Gilmore & Black, Pratt v. United States, 340 F.2d 174 (1st Cir. 1964) held that a seaman holding a valid (but unsatisfied) in personam judgment against a vessel owner could intervene in a subsequent in rem proceeding. However, the preclusive effect of the prior judgment was held to be of limited value. Applying the doctrine of res judicata the Pratt Court held that the findings in the in personam (Jones Act based) action were not binding against the mortgagee or other lienors in a subsequent in rem action. Although the amount of the in personam judgment could be used as a cap to recovery in the in rem action. See also McLaughlin v. Dredge Gloucester, 230 F.Supp. 623, 1964 A.M.C. 2123 (D.N.J. 1964) (successful Jones Act plaintiff gains a status as a judgment creditor, success in Jones Act case does not automatically convert his personal injury claim into a maritime lien); Baun v. The Ethel G., 125 F.Supp. 835 (D. Alaska 1954) (in personam action was not res judicata or a bar to a subsequent in rem action; and neither prior judgment nor evidence for prior in personam were admissible against the mortgagee or other lienors in the in rem action.).

in the Matos "action" but rather his unrelated claim to a maritime lien.

Moreover, as discussed above, the Matos case has terminated; there are no questions of fact or law remaining to be decided. Matos' argument that 28 U.S.C. §1962, by its statutory mandate, has created (post-judgment) a common question as to Matos' lien priority is unpersuasive. A plain reading of section 1962 demonstrates that its purpose is to create a lien. Matos failed to provide legal authority or argument which equated this separate and independent creation of a judgment lien with the questions of maritime lien status and priority at issue in the TCW action. Quite simply, section 1962 merely establishes Matos as a judgment creditor with a right to enforce his lien against the defendant. It does not reopen the underlying litigation for unrelated determinations of lien status or priority.

Three, in determining whether to consolidate cases courts must make a factual determination that such consolidation is beneficial. Courts must weigh the saving of time and effort that consolidation would create against any inconvenience, delay, or expense that consolidation would cause. In this case, this Court fails to see how any time and effort would be saved by consolidating these cases. As for this Court's time – the Matos case is over; no further time or effort will be expended on this case. As for Matos himself there is little time or effort to be saved through consolidation. If these cases were consolidated, Matos would be in no better position[2] than if he filed his in rem maritime lien claim separately. In Pratt v. United States, 340 F.2d 174 (1st Cir. 1964) it was held that the preclusive effect of a prior in personam Jones Act judgment was of limited assistance to a seaman in a later in rem action. Under the doctrine of res judicata the findings in the in personam action were not binding against

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[2] The Court recognizes that it could be argued that due to potential statute of limitations issues Matos would be in a better position through consolidation than through other methods. However, such a consideration is not material to this court's Rule 42 analysis.

the mortgagee or other lienors in the in rem case. See also Baun v. The Ethel G., 125 F.Supp. 835 (D. Alaska 1954) (in personam action was not res judicata or a bar to a subsequent in rem action; and neither prior judgment nor evidence from prior in personam case were admissible against the mortgagee or other lienors in the in rem action). No benefit will be gained through consolidation. On the other hand, consolidation would produce inconvenience, delay and expense. Most significant would be the potential delay placed on Defendant Chloe Z Fishing Company's right to appeal the result in CV94-00013.

A fourth factor is the fact that these cases are at significantly different stages of litigation. The Matos case is complete and proceeding on appeal; whereas, the Chloe Z in rem action is in the initial stages of discovery.

Lastly, although this Court accepted the parties [*sic*] arguments concerning alleged pretrial misrepresentations and possible discovery violations such factors are irrelevant to this Court's Rule 42 Consolidation determination. Rule 42 is designed to promote convenience and economy in the administration and management of civil litigation. It is not a device to provide an equitable remedy to any claimed pre-trial discovery violation or misrepresentation. Accordingly, these arguments were not considered.

For the reasons stated above Plaintiff Matos [*sic*] Motion to Consolidate is hereby DENIED.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Plaintiff Matos' Motion for Leave to File a Rebuttal Declaration is DENIED.

Dated: November 18, 1996.

/s/ JOHN S. UNPINGCO
JOHN S. UNPINGCO
District Judge

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

Case No. CV 94-00014

SLOBODAN PRANJIC,
Plaintiff,

v.

CHLOE Z FISHING COMPANY, INC.,
Defendant.

Case No. CV 94-00055

TCW SPECIAL CREDITS, *ET AL.*,
Plaintiffs and
Plaintiffs-in-Intervention,

v.

F/V CHLOE Z, HER ENGINES, TACKLE, APPAREL AND FURNITURE, ETC., *IN REM, ET AL.*,
Defendants.

[Filed Nov. 18, 1996]

MEMORANDUM ORDER

This matter came before this Court on Plaintiff Slobodan Pranjic ("Pranjic") Federal Rule of Civil Procedure 42(a) ("Rule 42") Motion for Consolidation. Pranjic requests this Court, under the authority of Rule 42, consolidate Slobodan Pranjic v. Chloe Fishing Company, Inc., in personam, CV94-00014 (the "Pranjic case") with TCW Special Credits v. F/V Chloe Z, in rem, et al., CV96-00055 (the "TCW action"). This Court has reviewed the motion and memoranda on file and has considered the arguments of counsel presented at the Friday, November 15, 1996 Motion Hearing. For the reasons explained on the record

and in this Memorandum Order Plaintiff Pranjic's Motion is hereby DENIED.

Pranjic is the plaintiff in CV94-00013 [*sic*]. After a multiple day trial in July 1996, Pranjic prevailed in his maritime personal injury case (Jones Act Negligence and Unseaworthiness) against the Chloe Z Fishing Company, in personam. A final judgment was entered on July 26, 1996. Pranjic now, over two months after the conclusion of the trial, brings this motion to consolidate. This request is based on the principal contention that there exists a common question of law as to the status of his alleged maritime and judgment liens with other lien holders in an unrelated in rem action against F/V Chloe Z – the TCW action.

The TCW action is a separate admiralty case filed in early August 1996 by TCW, the preferred ship mortgagee, against (among others) F/V Chloe Z, in rem. The vessel was arrested and is currently pending a Supplemental Rule E Interlocutory Sale. There are several Plaintiffs-in-Intervention: Shell; Clipper Oil; Starkist; and the Crewmembers. Therefore, there are also several claimants in competition for the limited funds expected from the vessel sale. The in personam defendant Chloe Z Fishing Company is a party to this action; however, the corporation has failed to appear and is therefore in default. Therefore, for practical terms the only defendant in the TCW case is the res, the F/V Chloe Z.

The determination of whether to consolidate civil cases is governed by Federal Rule of Civil Procedure 42(a), which states:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all actions consolidated; and it may make such orders concerning the proceedings therein as may tend to avoid unnecessary costs or delay.

Rule 42(a)'s objective is to provide a procedural mechanism whereby the court or the parties may move to join or

consolidate actions or issues in an effort to expedite litigation, improve docket control and advance judicial economy. The trial judge is given broad discretion in Rule 42(a) determinations. Each determination must be made with special attention to the facts and context of the case – balancing the competing interests. Based on a review of the parties [*sic*] arguments this Court has determined that Rule 42 consolidation is not proper in this case. The following factors were considered significant in making this determination.

First, Rule 42 is designed to apply to "pending" cases. Fed.R.Civ.P. 42(a) ("When actions involving a common question of law or fact are pending before the court. . .") (emphasis added). The trial in the Pranjic case was held in July 1996 and judgment was entered. The Pranjic case is over. In fact, pursuant to The Guide to Judicial Policy and Procedures, the Clerk of Court closed this case upon the entry of final judgment. In light of this procedural status, this Court, applying a practical and plain language definition, cannot state that this case is "pending" as intended by the Federal Rules. See also Fed.R.Civ.P. 1. Therefore, as a threshold matter this Court finds that Rule 42(a) does not provide authority for this Court to order consolidation of this case.

Second, Plaintiff Pranjic contends that there exists a common question law in each of the two cases. In support of this contention Pranjic argues:

> There being no disputed facts, the determination of the priorities among liens is a question of law. In re Patterson, 139 Bankr. 229 (9th Cir. 1992). Here Plaintiff, MATOS (sic) has a maritime lien against the Chloe Z in the Amount of the judgment entered. Plaintiffs TCW and Plaintiffs-in-Intervention also claim prospective liens against the Chloe Z. Which plaintiffs have priority over each other is a question of law. Plaintiff Matos Memorandum Filed October 22, 1996 at page 4.
>
> PRANJIC has a valid in rem claim against the CHLOE Z and is therefore entitled to participate in

> the proceedings involved in the foreclosure sale, and distribution of the sale funds. Granting consolidation would afford PRANJIC the right to assert his claim to proceeds from the sale of the Vessel with the other Plaintiffs. Plaintiff Matos Reply Memorandum Filed November 12, 1996 at page 4.

This Court does not concur with counsel for Plaintiff Pranjic that these or any other matters have created a common question of law and fact between these two cases. This determination is based on the following analysis.

To begin, it cannot be disputed that Pranjic may have a valid in rem claim against F/V Chloe Z or that he may be "entitled to participate in the proceedings involved in the foreclosure sale, and distribution of the sale funds." However, this independent fact does not "entitle" Pranjic to become "involved" through procedural consolidation of these cases.

The source of Pranjic's potential maritime lien is his actual personal injury not his in personam judgment in CV94-00014. The fact that the Pranjic case was brought in personam and the Chloe Z foreclosure case is in rem cannot be disregarded. This jurisdictional distinction makes the argument that there exists a commonality of any issues between these cases somewhat dubious. The original Pranjic case (CV94-00014) was a Jones Act/ Unseaworthiness in personam action. The Chloe Z foreclosure case (CV96-00055) is a Supplemental Rule C in rem action. Jones Act cases are directed toward the vessel owner and do not present or create any legal or factual questions as to the creation or priority of a maritime tort lien; such determinations are properly made by in rem actions against maritime property. Plamas v. The Piner Del Rio, 277 U.S. 151, 1926 AMC 932 (1926); Gilmore and Black, The Law of Admiralty, §6-22 and §9-20; see also Fed.R.Civ.P. Supplemental Admiralty Rule C. Therefore, a seaman's personal injury claim based on the Jones Act does not create a maritime lien but rather it is a judgment lien – subordinated to all valid maritime liens. Id. Accordingly, Pranjic's unsupported claim that the alleged

common question arises as a result of his "maritime lien against the Chloe Z in the Amount of the judgment entered" is misleading. Plamas v. The Piner Del Rio, 277 U.S. 151, 1926 AMC 932 (1926); Pratt v. United States, 340 F.2d 174 (1st Cir. 1964) (unsatisfied in personam judgement is not res judicata against mortgagee or other lienors). It follows that the Pranjic case, plead in personam not in rem, does not give rise to questions of the nature or priority maritime liens[1]. Determining the priorities among maritime liens is an issue only in the in rem action not in the original Pranjic case. In sum, Pranjic is correct that he may have a valid, tort-based (preferred) maritime lien against F/V Chloe Z and that the question of whether this maritime lien has priority over other liens is a question of law; however, as the original Pranjic case was brought in personam it never raised nor addressed any of these "maritime lien" issues. Therefore, any alleged commonality is not the result of the factual or legal

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[1] Nevertheless, the Court notes that the mere fact that an injured seaman has a valid non-maritime, judgment lien does not preclude him from filing a separate in rem action against the vessel based on a claim of a maritime lien based on tort. But see 46 App U.S.C.A. §463a (legislating a three-year statute of limitations for maritime liens (including personal injury) brought against a vessel in rem); Usher v. M/V Ocean Wave 27 F.3d 370 (9th Cir. 1994). As examined by Gilmore & Black, Pratt v. United States, 340 F.2d 174 (1st Cir. 1964) held that a seaman holding a valid (but unsatisfied) in personam judgment against a vessel owner could intervene in a subsequent in rem proceeding. However, the preclusive effect of the prior judgment was held to be of limited value. Applying the doctrine of res judicata the Pratt Court held that the findings in the in personam (Jones Act based) action were not binding against the mortgagee or other lienors in a subsequent in rem action. Although the amount of the in personam judgment could be used as a cap to recovery in the in rem action. See also McLaughlin v. Dredge Gloucester, 230 F.Supp. 623, 1964 A.M.C. 2123 (D.N.J. 1964) (successful Jones Act plaintiff gains a status as a judgment creditor, success in Jones Act case does not automatically convert his personal injury claim into a maritime lien); Baun v. The Ethel G., 125 F.Supp. 835 (D. Alaska 1954) (in personam action was not res judicata or a bar to a subsequent in rem action; and neither prior judgment nor evidence for prior in personam were admissible against the mortgagee or other lienors in the in rem action.).

issues brought before this Court in the Pranjic "action" but rather his unrelated claim to a maritime lien.

Moreover, as discussed above, the Pranjic case has terminated; there are no questions of fact or law remaining to be decided. Pranjic's argument that 28 U.S.C. §1962, by its statutory mandate, has created (post-judgment) a common question as to Pranjic' [*sic*] lien priority is unpersuasive. A plain reading of section 1962 demonstrates that its purpose is to create a lien. Pranjic failed to provide legal authority or argument which equated this separate and independent creation of a judgment lien with the questions of maritime lien status and priority at issue in the TCW action. Quite simply, section 1962 merely establishes Pranjic as a judgment creditor with a right to enforce his lien against the defendant. It does not reopen the underlying litigation for unrelated determinations of lien status or priority.

Three, in determining whether to consolidate cases courts must make a factual determination that such consolidation is beneficial. Courts must weigh the saving of time and effort that consolidation would create against any inconvenience, delay, or expense that consolidation would cause. In this case, this Court fails to see how any time and effort would be saved by consolidating these cases. As for this Court's time – the Pranjic case is over; no further time or effort will be expended on this case. As for Pranjic himself there is little time or effort to be saved through consolidation. If these cases were consolidated, Pranjic would be in no better position[2] than if he filed his in rem maritime lien claim separately. In Pratt v. United States, 340 F.2d 174 (1st Cir. 1964) it was held that the preclusive effect of a prior in personam Jones Act judgment was of limited assistance to a seaman in a later in rem action. Under the doctrine of res judicata the findings in the in personam action were not binding against

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[2] The Court recognizes that it could be argued that due to potential statute of limitations issues Matos [*sic*] would be in a better position through consolidation than through other methods. However, such a consideration is not material to this court's Rule 42 analysis.

the mortgagee or other lienors in the in rem case. See also Baun v. The Ethel G., 125 F.Supp. 835 (D. Alaska 1954) (in personam action was not res judicata or a bar to a subsequent in rem action; and neither prior judgment nor evidence from prior in personam case were admissible against the mortgagee or other lienors in the in rem action). No benefit will be gained through consolidation. On the other hand, consolidation would produce inconvenience, delay and expense. Most significant would be the potential delay placed on Defendant Chloe Z Fishing Company's right to appeal the result in CV94-00014.

A fourth factor is the fact that these cases are at significantly different stages of litigation. The Pranjic case is complete and proceeding on appeal; whereas, the Chloe Z in rem action is in the initial stages of discovery.

Lastly, although this Court accepted the parties [*sic*] arguments concerning alleged pretrial misrepresentations and possible discovery violations such factors are irrelevant to this Court's Rule 42 Consolidation determination. Rule 42 is designed to promote convenience and economy in the administration and management of civil litigation. It is not a device to provide an equitable remedy to any claimed pre-trial discovery violation or misrepresentation. Accordingly, these arguments were not considered.

For the reasons stated above Plaintiff Pranjic's Motion to Consolidate is hereby DENIED. IT IS SO ORDERED.

IT IS FURTHER ORDERED that Plaintiff Pranjic's Motion for Leave to File a Rebuttal Declaration is DENIED.

Dated: November 18, 1996.

/s/ JOHN S. UNPINGCO
JOHN S. UNPINGCO
District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-15136
(D.C. No. CV-96-00055-JSU)

TCW SPECIAL CREDITS,
Plaintiff,

v.

FISHING VESSEL CHLOE Z,
Defendant – Appellant,

v.

ROBERT MATOS; CLIPPER OIL; SHELL GUAM, INC.;
FRANK PEREZ; STARKIST CARIBE, INC.;
JUAN BARANDIARAN, ET AL.,
Plaintiffs-Intervenors,

AND

SLOBODAN PRANJIC,
Plaintiff-Intervenor –
Appellant.

Appeal from the United States District Court
for the District of Guam
John S. Unpingco, District Judge, Presiding

Argued and Submitted Aug. 1, 2000
Decided Sept. 8, 2000
As Amended Oct. 3, 2000

Before PREGERSON, HAWKINS, and McKEOWN, Circuit Judges.

MEMORANDUM[1]

The fishing vessel CHLOE Z appeals (1) the district court's denial of its motion to dismiss seaman Slobodan Pranjic's claims as res judicata pursuant to Federal Rule of Civil Procedure 41(a)(1)(i)'s "two dismissal" rule, (2) the court's decision to apply the doctrine of equitable estoppel to preclude the CHLOE Z from raising a statute of limitations defense, (3) the court's decision not to reduce Pranjic's future lost wages to account for applicable Croatian income taxes, and (4) the court's award of $43,951.92 in past medical expenses. We have jurisdiction under 28 U.S.C. § 1292(a)(3), and we affirm in part, reverse in part, and remand for further proceedings.[2]

Pranjic filed and voluntarily dismissed three prior actions, the first in the district court for the Southern District of California, the second in a California state court, and the third in a Hawaii state court. To begin, we reject the CHLOE Z's contention that the latter two dismissals were adjudications upon the merits under Rule 41(a)(1)(i) for the reason that *Federal* Rule of Civil Procedure 41(a)(1)(i) does not govern voluntary dismissals in *state* courts. We recognize, however, that unlike California, Hawaii has adopted a rule nearly identical to Federal Rule 41(a)(1)(i). *See* Haw. R. Civ. P. 41(a)(1)(A).[3] Therefore the question is whether Pranjic's third dismissal was an adjudication upon the merits under Hawaii Rule

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

[2] This appeal and related appeals arise from many years of litigation involving the CHLOE Z. Judge Unpingco is to be complimented not only for the substantial time he committed to resolution of the numerous claims in this and the related actions, but also for his careful legal analysis and well-documented record. Likewise, we appreciate the quality briefing provided by all counsel on appeal.

[3] Hawaii Rule 41(a)'s "two dismissal" rule was not modified by the recent amendments to Hawaii's civil rules, which were effective January 1, 2000.

of Civil Procedure 41(a)(1)(A). See *Manning v. South Carolina Dep't of Hwy. and Pub. Transp.*, 914 F.2d 44, 47 n.5 (4th Cir.1990).

In interpreting Hawaii's "two dismissal" rule, we look to our own construction of the parallel Federal Rule for guidance, *Kawamata Farms, Inc. v. United Agri Prods.*, 86 Hawai'i 214, 948 P.2d 1055, 1096 (Haw.1997), keeping in mind that we have no definitive interpretation from Hawaii and that "[t]he basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion." *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373, 86 S.Ct. 845, 15 L.Ed.2d 807 (1966).

Voluntary dismissals under Fed.R.Civ.P. 41(a)(1) are normally without prejudice except that a dismissal by notice under 41(a)(1)(i) "operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim." Fed.R.Civ.P. 41(a)(1)(i). In *Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Dev. Corp.*, 933 F.2d 724 (9th Cir.1991), however, we noted that some courts have declined to strictly apply the rule when the parties consented to one of the prior dismissals or where the dismissal was not unilateral. *Id.* at 727 (discussing *Poloron Prod., Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1017-18 (2d Cir.1976)). The Second Circuit in *Poloron*, for example, reasoned that in such situations where the purpose of the rule – to avoid harassing the defendant – would not be served, courts should be "most careful not to construe or apply the [rule] too broadly." *Poloron*, 534 F.2d at 1017.

Based on the circumstances here, strict application of the two dismissal rule is not warranted. For example, the record indicates that the Hawaii dismissal was preceded by discussions between the parties about litigating the action in Guam. Counsel for the CHLOE Z stated in correspondence: "If you will agree to dismiss the currently

pending actions [in California and Hawaii] and refile them in a court in Guam, we will consider arranging for depositions to be taken in Guam[.]" Counsel for Pranjic confirmed that the Hawaii case would be "withdraw[n]" and refiled in Guam. Although the Hawaii dismissal was not formally "stipulated," it was not unilateral as all parties tacitly agreed to the dismissal in favor of litigating the action in Guam. Also, there is no evidence that the filings and dismissals were part of a strategy to harass the CHLOE Z. Accordingly, we affirm the district court's decision not to dismiss Pranjic's action on res judicata grounds.

We reverse the district court's equitable estoppel ruling and remand for further proceedings as to that issue. On the CHLOE Z's motion to dismiss and vacate *in rem* process under Supplemental Admiralty Rule E(4)(f), the court ruled conclusively that the vessel was equitably estopped from arguing that Pranjic's *in rem* claims were barred by the applicable 3-year statute of limitations for maritime torts. In so doing, the court improperly resolved disputed issues of material fact, including whether the CHLOE Z in fact made any representations that the *in personam* judgment would be satisfied under the insurance policy, to what extent Pranjic relied to his detriment upon the alleged representations, and whether such reliance caused the statute of limitations to lapse on Pranjic's *in rem* claims against the vessel. We remand on this issue for a fact-finding hearing to permit the court an opportunity to make the factual determinations necessary to decide whether the CHLOE Z should be equitably estopped from raising a statute of limitations defense. We leave to the district court's discretion any decisions regarding additional discovery on this issue.

As for the CHLOE Z's argument that the court erred in not reducing Pranjic's lost wages to account for applicable Croatian income taxes, we affirm for the reasons set forth in the Memorandum Disposition filed in *Vjeko Mazic v. F/V CHLOE Z*, No. 99-15169 (filed concurrently with this disposition).

Finally, Pranjic concedes that the court erred in awarding $43,951.92 for past medical expenses. Accordingly, we reverse on this issue and direct the district court to amend the judgment accordingly on remand.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Each party to pay its own costs on appeal.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-15350 & 99-15612
(D.C. No. CV-96-00055-JSU)

TCW SPECIAL CREDITS,
Plaintiff,

v.

FISHING VESSEL CHLOE Z,
Defendant – Appellant –
Cross-Appellee,

v.

SLOBODAN PRANJIC; CLIPPER OIL; SHELL GUAM, INC.;
FRANK PEREZ; STARKIST CARIBE, INC.;
JUAN BARANDIARAN, ET AL.,
Plaintiffs-Intervenors,

AND

ROBERT MATOS,
Plaintiff-Intervenor –
Appellee –
Cross-Appellant.

Appeal from the United States District Court
for the District of Guam
John S. Unpingco, District Judge, Presiding

Argued and Submitted Aug. 1, 2000
Decided Sept. 8, 2000

Before PREGERSON, HAWKINS, and McKEOWN, Circuit Judges.

MEMORANDUM[1]

The fishing vessel CHLOE Z appeals (1) the district court's denial of its motion to dismiss seaman Robert Matos's claims as res judicata by application of Federal Rule of Civil Procedure 41(a)(1)'s "two dismissal" rule to two prior dismissals and (2) the court's decision to apply the doctrine of equitable estoppel to preclude the CHLOE Z from raising a statute of limitations defense. Matos cross-appeals (1) the district court's refusal to apply the doctrine of collateral estoppel to issues decided in the earlier *in personam* action against the vessel's owner, (2) the court's finding that Matos was 33% contributorily negligent for his injuries, (3) the court's calculation of future earnings, and (4) the court's denial of prejudgment interest. We have jurisdiction under 28 U.S.C. § 1292(a)(3), and we affirm in part, reverse in part, and remand for further proceedings.[2]

We affirm the district court's res judicata ruling. Matos's second dismissal was in a California state court, a court in which Rule 41(a)(1)(i) did not apply. *See Rader v. Baltimore & O.R. Co.*, 108 F.2d 980, 986 (7th Cir.), *cert. denied*, 309 U.S. 682 (1940); *see also* 9 Wright & Miller, Federal Practice & Procedure § 2368, at 330 (1995). And, California courts do not have a civil rule equivalent to Rule 41(a)(1)(i). *See Manning v. South Carolina Dep't of Hwy. and Pub. Transp.*, 914 F.2d 44, 47 n.5 (4th Cir. 1990). Consequently, neither of Matos's two prior dismissals were dismissals "with prejudice," thus the district

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[2] This appeal and related appeals arise from many years of litigation involving the CHLOE Z. Judge Unpingco is to be complimented not only for the substantial time he committed to resolution of the numerous claims in this and the related actions, but also for his careful legal analysis and well-documented record. Likewise, we appreciate the quality briefing provided by all counsel on appeal.

court was correct in declining to apply the doctrine of res judicata to bar this action.

We reverse the district court's equitable estoppel ruling and remand for further proceedings as to that issue. On the CHLOE Z's motion to dismiss and vacate *in rem* process under Supplemental Admiralty Rule E(4)(f), the court ruled conclusively that the vessel was equitably estopped from arguing that Matos's *in rem* claims were barred by the applicable 3-year statute of limitations for maritime torts. In so doing, the court improperly resolved disputed issues of material fact, including whether the CHLOE Z in fact made any representations that the *in personam* judgment would be satisfied under the insurance policy, to what extent the seamen relied to their detriment upon the alleged representations, and whether such reliance caused the statute of limitations to lapse on Matos's *in rem* claims against the vessel. We remand on this issue for a fact-finding hearing to permit the court an opportunity to make the factual determinations necessary to decide whether the CHLOE Z should be equitably estopped from raising a statute of limitations defense. We leave to the district court's discretion any decisions regarding additional discovery on this issue.

Turning to the issues raised in Matos's cross-appeal, we affirm the district court's refusal to apply the doctrine of collateral estoppel to issues decided in the earlier *in personam* action against the vessel's owner. Assuming without deciding that collateral estoppel was available as a matter of law, we hold that the district court did not, given the procedural differences between the two proceedings and the concerns raised by other lien claimants in this forfeiture action, abuse its discretion in declining to apply it. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331 (1979); *see also Town of N. Bonneville v. Callaway*, 10 F.3d 1505, 1508 (9th Cir.1993).

We affirm the district court's conclusion that Matos was 33% contributorily negligent for his injuries. Indeed, the CHLOE Z's expert opined that Matos was 100% at fault

because he attempted to lift the strainer too aggressively without trying to loosen it first. The court's decision to assign some responsibility for the accident to Matos was not, based on the evidence presented at the *in rem* trial, clear error. *See Havens v. F/T Polar Mist*, 996 F.2d 215, 217 (9th Cir.1993).

We also affirm the district court's conclusion to calculate lost future earnings based on nine months of work per year as opposed to eleven months of work per year. Based on this record, it was not clear error for the court to conclude that Matos would not have averaged more than nine months of work per year.[3]

Finally, we reverse the denial of prejudgment interest. "In admiralty, prejudgment interest must be granted unless peculiar circumstances justify its denial." *Vance v. American Hawaii Cruises, Inc.*, 789 F.2d 790, 794 (9th Cir.1986) (quoting *Dillingham Shipyard v. Associated Insulation Co.*, 649 F.2d 1322, 1328 (9th Cir.1981)). Because the court did not articulate any reason for denying prejudgment interest, we remand under *Vance* for a determination whether special circumstances justify the denial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.[4] Each party to pay its own costs on appeal.

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[3] We also reject the CHLOE Z's argument that the district court miscalculated Matos's past and future lost wages. Based on the record supplied by the CHLOE Z, the district court did not err by deducting an additional 2/12, or 16.67%, to reflect lost wages based on a nine month work year.

[4] Matos's motion for judicial notice is denied.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-15948
(D.C. No. CV-96-00055-JSU
District of Guam, Agana)

TCW SPECIAL CREDITS,
Plaintiff,

v.

FISHING VESSEL CHLOE Z,
Defendant – Appellee,

v.

ROBERT MATOS; SLOBODAN PRANJIC,
Plaintiff-intervenors –
Appellants.

[Filed August 3, 2006]

ORDER

Before: NOONAN and HAWKINS, Circuit Judges, and REED,* District Judge.

The majority of the panel votes to deny the petition for rehearing. Judge Hawkins votes to deny petition for rehearing en banc and Judge Noonan recommends denying the petition for rehearing en banc.

Judge Reed votes to grant the petition for rehearing and recommends granting the petition for rehearing en banc for the reasons stated in his dissent to the June 5, 2006 Memorandum Disposition.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a

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* The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

STATUTORY PROVISIONS INVOLVED

Section 6 of the Federal Employers' Liability Act, 45 U.S.C. § 56, provides:

§ 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

The Jones Act, 46 U.S.C. app. § 688 (2000), provides:

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees

shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred –

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources – including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by (a) vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person –

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

46 U.S.C. app. § 763a (2000) provides:

§ 763a. Limitations

Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

The Act of October 6, 2006, Pub. L. No. 109-304, 120 Stat. 1485, provides in relevant part:

An Act

To complete the codification of title 46, United States Code, "Shipping", as positive law

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

SEC. 2. PURPOSE; CONFORMITY WITH ORIGINAL INTENT.

(a) PURPOSE.—The purpose of this Act is to complete the codification of title 46, United States Code, "Shipping", as positive law, by reorganizing and restating the laws currently in the appendix to title 46.

(b) CONFORMITY WITH ORIGINAL INTENT.—In the codification of laws by this Act, the intent is to conform to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections, in accordance with section 205(c)(1) of House Resolution No. 988, 93d Congress, as enacted into law by Public Law 93-554 (2 U.S.C. 285b(1)).

* * * * *

SEC. 6. SUBTITLE III OF TITLE 46.

* * * * *

(c) CHAPTERS 301-311.—Title 46, United States Code, is amended by inserting after the analysis of subtitle III the following:

* * * * *

"§ 30104. Personal injury to or death of seamen

"(a) CAUSE OF ACTION.—A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring

a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

"(b) VENUE.—An action under this section shall be brought in the judicial district in which the employer resides or the employer's principal office is located.

"§ 30105. Restriction on recovery by non-citizens and non-resident aliens for incidents in waters of other countries

"(a) DEFINITION.—In this section, the term 'continental shelf' has the meaning given that term in article I of the 1958 Convention on the Continental Shelf.

"(b) RESTRICTION.—Except as provided in subsection (c), a civil action for maintenance and cure or for damages for personal injury or death may not be brought under a maritime law of the United States if—

"(1) the individual suffering the injury or death was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action;

"(2) the incident occurred in the territorial waters or waters overlaying the continental shelf of a country other than the United States; and

"(3) the individual suffering the injury or death was employed at the time of the incident by a person engaged in the exploration, development, or production of offshore mineral or energy resources, including drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment, or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces.

"(c) NONAPPLICATION.—Subsection (b) does not apply if the individual bringing the action establishes that a remedy is not available under the laws of—

"(1) the country asserting jurisdiction over the area in which the incident occurred; or

"(2) the country in which the individual suffering the injury or death maintained citizenship or residency at the time of the incident.

"§ 30106. Time limit on bringing maritime action for personal injury or death

"Except as otherwise provided by law, a civil action for damages for personal injury or death arising out of a maritime tort must be brought within 3 years after the cause of action arose.

* * * * *

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

October 26, 2006

Mr. Michael A. Barcott
Holmes Weddle & Barcott
999 Third Avenue
Suite 2600
Seattle, WA 98104

Re: Fishing Vessel Chloe Z
v. Robert Matos, et al.
Application No. 06A414

Dear Mr. Barcott:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on October 26, 2006 extended the time to and including December 1, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ CLAYTON HIGGINS
Clayton Higgins
Case Analyst

[attached notification list omitted]

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

November 27, 2006

Mr. David C. Frederick
Kellogg Huber Hansen
Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Re: Fishing Vessel Chloe Z
v. Robert Matos, et al.
Application No. 06A414

Dear Mr. Frederick:

The application for a further extension of time in the above-entitled case has been presented to Justice Kennedy, who on November 27, 2006 extended the time to and including December 29, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ CLAYTON HIGGINS
Clayton Higgins
Case Analyst

[attached notification list omitted]